Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

Paul K. Mancini
SBC COMMUNICATIONS INC.
175 E. Houston
Room 1262
San Antonio, TX 78205
(210) 351-3448

Gary L. Phillips
Jeffry A. Brueggeman
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8800

Michael K. Kellogg
Sean A. Lev
Colin S. Stretch
David L. Schwarz
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

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INTRODUCTION AND SUMMARY

Contrary to the apocalyptic proclamations of some commenters, the deregulatory initiatives that the Commission is considering in this proceeding are neither extreme nor revolutionary. Classification of wireline broadband Internet access services as information services does not represent a departure from the Commission's prior conclusions. Further, deregulation of these services does not affect state authority or regulation of currently tariffed intrastate basic telecommunications services, including POTS. It does not alter the status quo for ISPs for dial-up narrowband services or deny ISPs access to wireline broadband consumers. It is, instead, forward-looking in establishing a new uniform national regulatory paradigm for broadband information services.

Moreover, the Commission has already resolved the key factual and legal issues in this proceeding. The issue now is simply one of *aligning* the Commission's actual regulation of wireline broadband service with both the Commission's consistent prior conclusions about the highly competitive nature of the broadband market and its decisions not to impose analogous regulatory burdens on providers that have twice the Bell companies' share of the broadband Internet access market. Accordingly, the result that would in fact be "startling"[1] and "radical"[2] – not to mention unlawful and anticompetitive – would be for this Commission to betray its prior findings and legal conclusions and keep wireline broadband providers, but not their market-leading competitors, in a regulatory straitjacket. Established principles of reasoned decision-making, as well as the text and intent of the 1996 Act, preclude the Commission from following such an irrational path. In the context of this case, the only result that rationalizes the Commission's broadband policy is to grant the same freedoms to wireline carriers as the Commission has already granted to cable providers.

[1] WorldCom at 2.

[2] Covad at ii.

As an initial matter, contrary to the claims of some commenters, there is no reasonable argument that bundled wireline broadband information services – including, but not limited to, Internet access services – must be designed to create a separate telecommunications service. In the *Cable Broadband Declaratory Ruling*,[3] the Commission expressly found that this type of intrusive design constraint should not be imposed on cable broadband Internet access services, even though cable providers own the underlying transmission facilities and sometimes provide customers with telecommunications services. There is simply no basis to distinguish the legal question presented in the *Cable Broadband* proceeding from the one at issue here, especially since the Commission stated plainly in that case that "none" of the relevant statutory definitions "rests on the particular types of facilities used."[4] It would be both arbitrary and unlawful for the Commission to resolve the same legal issue differently for wireline and cable providers.

Similarly, the Commission has already made findings compelling the conclusion that broadband Internet access services should be exempted from the *Computer Inquiry* service-unbundling requirement and regulated, if at all, exclusively under Title I. As even WorldCom acknowledges, these requirements are unjustified where BOCs no longer own "bottleneck facilities" in the relevant market.[5] The Commission has found that to be the case in the context of broadband Internet access. As the D.C. Circuit recently stressed, broadband is highly competitive: "*The Commission's own findings . . . repeatedly confirm both the robust*

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[3] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Broadband Declaratory Ruling*").

[4] *Id.* at 4821, ¶ 35.

[5] WorldCom at 32 ("The only sound policy justification for abandoning regulation of bottleneck facilities would be an empirical conclusion that last-mile transmission facilities are no longer bottleneck facilities.").

competition, and the dominance of cable, in the broadband market."[6] Indeed, the Commission reiterated this year that cable modem is by far "the most widely subscribed to" broadband technology with approximately 68% of the residential market.[7] Moreover, the records established in the *Triennial Review* and *Wireline Broadband Non-Dominance* proceedings confirm that the BOCs also lag far behind in the broadband *business* market, where the IXCs are the clear market leaders. As the Commission has concluded, "the one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms, including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services."[8]

Thus, when commenters claim that there is no separate broadband market[9] – much less a highly competitive intermodal market – they are in fact taking issue with the repeated (and plainly correct) findings of this Commission.[10] Again, therefore, the Commission can accept

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[6] *United States Telecom Ass'n v. FCC*, Nos. 00-1012, *et al.*, slip op. at 22, (D.C. Cir. May 24, 2002) ("*USTA*") (emphasis added).

[7] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4803-04, ¶ 9.

[8] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001) ("*Wireline Broadband Non-Dominance NPRM*").

[9] *E.g.*, WorldCom at 48.

[10] *See* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6574, ¶ 69 (2001) ("We begin by addressing whether high-speed internet access services, as distinct from narrowband services, constitute the relevant product market in determining the effects of the proposed merger on the public interest. We conclude that they do."); FCC Staff Report, *Broadband Today* 42 (Oct. 1999) ("*Broadband Today*") (arguing that cable's dominance over broadband will be tempered not by dial-up services but rather by "alternative platforms to use for high-speed data access"); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864-65, ¶ 18 (2000) ("*Fixed Wireless Competition Order*") (discussing

these arguments for maintaining the *Computer Inquiry* rules only if it repudiates its own, directly relevant (and plainly correct) conclusion that broadband Internet access does constitute a separate market, and that it is in fact one characterized by significant intermodal competition.

Moreover, consistent with these repeated findings about the existence of a single, intermodally competitive broadband market, the Commission has again already granted to the market-leading cable providers the core regulatory relief that is at issue here. In the *Cable Broadband Declaratory Ruling*, the Commission rejected the arguments of Earthlink and other ISPs that the Commission should apply the *Computer Inquiry* service unbundling obligations to the market-leading cable providers. The Commission decided to waive any such "open access" obligations that might exist because they would be "inconsistent with the public interest" and would "disserve the goal of Section 706 that [the Commission] 'encourage the deployment'" of broadband facilities.[11] In reaching that conclusion, the Commission expressly acknowledged cable operators' arguments – arguments that are directly contrary to their claims here – that such regulatory requirements would "delay deployment" of their broadband service.[12] Having determined that the public interest supports waiver of the *Computer Inquiry* rules as to cable providers, the only rational result is to reach the same conclusion here. What SBC seeks is the freedom possessed by the market leader to structure its relationships with ISPs in an efficient

competition in the broadband market); *see also* Competitive Impact Statement at 9, *United States v. AT&T Corp.*, Civil No. 00-CV-1176 (D.D.C. filed May 25, 2000) ("A relevant product market affected by [the AT&T/MediaOne] transaction is the market for aggregation, promotion, and distribution of broadband content and services."); Complaint ¶ 21, *AOL, Inc. v. Time Warner, Inc.*, Docket No. C-3989 (FTC filed Dec. 14, 2000) ("The relevant product market in which to assess the effects of the proposed merger is the provision of residential broadband internet access service.").

[11] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4826, ¶ 47.

[12] *Id.* at 4826 n.176.

manner that will best service consumers – and increase the demand for broadband services that many commenters claim is lacking.

The wisdom of that approach – and the arbitrariness of the unbalanced state of affairs that exists today – is further established by the D.C. Circuit's *USTA* decision. After acknowledging the market dominance of the incumbent cable providers, the *USTA* court criticized the Commission for the "quite unreasonable" approach of regulating wireline facilities with "naked disregard" for the competitive context.[13] If the Commission nonetheless persists in drawing regulatory distinctions between cable and ILEC broadband in this and related proceedings, it will undoubtedly result in a similar judicial response here.

Perversely, however, some commenters claim that, because the Commission has to date relied on the market to provide ISPs access to cable broadband networks, and because the incumbent cable providers have been slow to provide such access, the Commission must now guarantee such access to wireline broadband facilities. AT&T's comments on this point are perhaps the most noteworthy. AT&T has argued repeatedly in other proceedings that "fundamental economic truths" establish that "[n]egotiated agreements, rather than government mandates, are the most appropriate means for creating and defining access relationships" for ISPs.[14] Yet, in a feat of stunning hypocrisy and opportunism, AT&T now argues the precise opposite. It claims that the *Computer Inquiry* requirements must be retained because ISPs rarely have alternative broadband suppliers.[15] It further claims that providers that have less than half of cable's market-share – and that, unlike cable, have a long history of productive business relationships with independent ISPs – will not offer access unless forced to do so through

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[13] *USTA*, slip op. at 24.

[14] AT&T Comments at 80, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("*AT&T Open Access NOI Comments*").

[15] AT&T at 3.

regulation. AT&T thus asserts that, without mandated access to the facilities of the secondary broadband providers, "few [independent ISPs] could be expected to survive in the long-term."[16] Given AT&T's vociferous advocacy in favor of market freedom for cable providers, its position here that ILECs must be regulated because cable providers are not – *i.e.*, that asymmetrical regulation is its own justification – cannot be taken seriously.

In any event, there is no basis for concern that BOCs will not continue to offer broadband facilities to many independent ISPs. As SBC noted in its opening comments, it has business relationships with hundreds of independent ISPs now for broadband Internet access, and it has no desire to end them. For that reason, as SBC previously noted, it has negotiated the attached Memorandum of Understanding ("MOU") with the US Internet Industry Association ("USIIA") – an association of nearly 300 diverse Internet providers, including ISPs – that commits SBC to negotiate commercial agreements with ISPs for broadband Internet access in a deregulated environment. SBC's commitment on this score is simply a reaction to the undeniable market-based incentive it has to ensure the widest possible acceptance of wireline DSL. AT&T, on the other hand, has made no such commitment to ISPs, despite its claim that cable providers have more of an incentive than ILECs to permit open access, and despite its repeated pledges to this Commission – made in order to gain approval of its mergers – to do so.

For all these reasons, the Commission should ensure that all wireline broadband information services – *i.e.*, those provided using packet-based and successor technologies – may be provided in the same deregulated environment in which cable, wireless, and satellite providers currently offer their competing services. ISPs themselves have recognized that the market, and the existence of significant intermodal competition between competing broadband platforms, will permit them access on reasonable terms. That is why, for its part, the USIIA has agreed to

[16] *Id.*

the attached MOU urging the Commission to replace regulation with the freedom to negotiate market-based commercial arrangements. The absence of regulation will permit all broadband providers and ISPs to design new and innovative services, and to structure their relationships in ways most responsive to market demand.

Moreover, even if commenters are correct that Commission regulation is required to ensure ISP access to broadband Internet access services, that would not justify the status quo. Section 706 requires the Commission to encourage broadband deployment "without regard to any transmission media or technology."[17] And while SBC agrees with the dominant cable incumbents that a *de*regulatory framework would best serve that goal, the critical point is that the cost/benefit calculus required by section 706 does not vary based on the type of broadband facility at issue. As discussed below, cable and wireline providers use similar packet-based networks to route traffic to ISPs, which means that the network architectures of both platforms are functionally equivalent for purposes of providing ISP access. If the Commission concludes that the costs of a mandatory access regime are too burdensome for the dominant cable providers, it must reach the same conclusion for wireline companies as well. So too with the calculation of any benefits that the Commission believes may result from a mandatory access regime: If it makes sense to require ISP access to the wireline providers that serve less than 30% of the market, it must make sense to require access to the dominant providers that serve more than double that amount.

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The remainder of these Reply Comments are organized as follows. Part I demonstrates that, as in the cable broadband context, the critical first step towards a "minimal regulatory

[17] 47 U.S.C. § 157 note.

environment"[18] is to eliminate the *Computer Inquiry* rules that require wireline broadband information service providers alone to engage in the "radical surgery" necessary to create a separate telecommunications service. Part I also explains that, once those rules are eliminated, the Commission should examine the question of ISP access on its own terms, and impose any resulting access requirements on a uniform basis to all facilities-based providers. Part II then explains why, especially in light of the recent D.C. Circuit decision, as a matter of law, such a consistent regulatory framework for all competing broadband providers is the only defensible alternative. Part III explains that, contrary to the hyperbolic claims of many commenters, these steps will not impact the market-opening provisions of the 1996 Act. Part IV reiterates that the Commission must take affirmative steps to ensure that its broadband rules are not undermined by piecemeal state regulation. Finally, Part V explains that other issues in this proceeding, including those involving national security, universal service, and cost allocation, should be resolved consistent with the pro-competitive principles that the Commission has established.

[18] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3022-23, ¶¶ 4-7 (2002) ("*NPRM*") (emphasis added).

DISCUSSION

I. THE COMMISSION HAS CORRECTLY DETERMINED THAT A MINIMAL REGULATORY FRAMEWORK FREE OF LEGACY REGULATION SHOULD APPLY TO BROADBAND SERVICES

The central issue in this proceeding is whether the Commission should continue to require what it has rightly deemed "radical surgery" – *i.e.*, forcing all wireline providers to "extract" a separate common-carrier telecommunications service from their bundled broadband information services.[19] In light of the Commission's conclusion that these rules do not apply to cable, talk of deregulation and consistent regulatory rules for all providers will be "meaningless" if the Commission does not eliminate them for wireline providers as well.[20]

It is important to stress at the outset, however, that there is no necessary or logical connection between the issue of whether, on the one hand, the Commission should retain those outmoded and anticompetitive rules for wireline broadband providers and, on the other, the lone arguably legitimate policy concern here: ensuring broadband consumers a choice of ISPs. The Commission has properly recognized this crucial fact in the cable context. In its *Cable Broadband Declaratory Ruling and NPRM*, the Commission definitively concluded that the *Computer Inquiry* service-unbundling rules would not apply to the dominant cable incumbents.[21] It then initiated an entirely separate rulemaking to consider what ISP access requirements, if any, should apply to them. The Commission thus de-linked the question of the applicability of *Computer Inquiry* rules from the separate issue of ensuring sufficient ISP access to benefit consumers.

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[19] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 43.

[20] BellSouth at 14.

[21] *See Cable Broadband Declaratory Ruling,* 17 FCC Rcd at 4840-47, ¶¶ 73-93.

That same mode of analysis applies here as well. The critical question that the Commission must resolve here is whether to apply the *Computer Inquiry* mandatory access framework – a framework adopted more than two decades ago in a "one-wire world" – to the nascent broadband marketplace. It should resolve that question as it did in the *Cable Broadband Declaratory Ruling*: on its own terms, without bootstrapping the issue of ISP access into a rationale for extending these antiquated rules into the burgeoning broadband marketplace. Only then should the Commission turn to the question of ISP access, and resolve it in a principled manner that takes account of the facilities-based competition in the market.

A. The Commission Should Conclude That the *Computer Inquiry* Rules Do Not Apply to Wireline Broadband Information Services.

The Commission has expressly held that it is both consistent with the congressional policy codified in section 706 and strongly in the "public interest" to permit cable broadband providers the freedom to operate from the *Computer Inquiry* rules, and accordingly to structure their offerings as the market dictates.[22] The Commission's own findings mandate that it extend that conclusion to wireline service providers as well. The *Computer Inquiry* requirements are vestiges of the "one-wire" world, and are based on "legal, technological, and market circumstances" that are "very different" from those that exist today.[23]

In this respect, it is important to clarify that, contrary to the assumption of numerous commenters, the *Computer Inquiries* framework was not created merely for the sake of ISPs. Rather, it was designed to facilitate access to the "one wire" by *all* "[p]roviders of data processing and other computer services," and indeed sought to encompass each and every "combination[] and permutation[] of enhanced services that may be offered over the nationwide

[22] *See id.* at 4826, ¶ 47 & n.176.

[23] *NPRM*, 17 FCC Rcd at 3037, ¶ 35.

telecommunications network."[24] And it did so on the assumption that the "nationwide telecommunications network" was the exclusive "building block" that all the various "service vendors" and other entities needed "to perform . . . information processing, data processing, process control, and other enhanced services."[25]

That assumption is plainly inapposite here. The record established in the *Triennial Review* establishes beyond dispute that packet-based services generally – and broadband Internet access services in particular – are robustly competitive. The D.C. Circuit recently acknowledged the same thing.[26] And, critically, in view of that competition, the *Computer Inquiry* requirements are not merely anachronistic. Rather, they impose real-world costs, by significantly hampering wireline providers' ability to design new and innovative services to compete with the dominant cable incumbents, and by diminishing their incentives to deploy new technologies and facilities.

1. The cable incumbents already possess by far the "most widely subscribed to technology," with close to 70% of the residential market.[27] Cable is already viewed as "invincible," and is expected to "remain the leading access platform within the consumer market."[28] If wireline providers are to close the gap, they must be able to develop new services, address consumer demand, and generally respond to market forces.

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[24] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 423, ¶ 102, 426, ¶ 110 (1980).

[25] *Id.* at 420, ¶ 96.

[26] *USTA*, slip op. at 22.

[27] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4802-04, ¶ 9; *see* Jonathan R. Laing, *Ready to Charge*, Barron's, May 20, 2002 ("cable is clobbering the Bells . . . in the race to wire U.S. homes with Internet connections. In fact, cable modems are maintaining their 2-to-1 edge over the phone industry's DSL).

[28] *See* Imran Khan, Yankee Group, *Residential Broadband: Cable Modem Remains King*, 7, 8 (2002).

There can be no serious dispute, however, that the Commission's existing rules severely limit wireline providers' ability to do so. One need look no further than the comments of the dominant cable incumbents themselves to see just how severe those limitations are. A mandatory access regime, they explain, has the "disastrous" effects of preventing carriers from reaching the "most efficient solution" to consumer demand and "impair[ing] the implementation of 'case-by case' access arrangements tailored to meet" the demands of the marketplace.[29] Indeed, this "inflexible regulatory mandate" prevents "the vibrant commercial experimentation that is necessary to develop the most efficient [broadband] solutions" to customers' needs.[30] Above all, broadband providers and ISPs must "retain the flexibility to modify their arrangements in response to actual commercial experience," or else *consumers* – whose interests, after all, are paramount in this proceeding – will suffer.[31]

Contrary to the self-serving claims of the cable incumbents, there can be no serious claim that the importance of this "flexibility" depends on the nature of a particular broadband service provider's underlying transmission facilities. SBC and other wireline providers – no less than the dominant cable incumbents – are fully capable of developing new products that, as a technical matter, may not be susceptible to the radical surgery required by the *Computer Inquiry* rules. They are also capable of – and committed to – structuring their relationships with ISPs in a manner that best meets market demand. If allowed the same freedom as cable providers, SBC might well seek to enter into joint provisioning arrangements with independent ISPs to provide broadband Internet access, in much the way some cable providers claim is pro-competitive. Under this type of arrangement, SBC and the ISP would be cooperating to provide a retail

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[29] Comments of AT&T Corp. at 5, GN Docket No. 00-185, CS Docket No. 02-52 (FCC filed June 17, 2002) ("*AT&T Cable Broadband Comments*").

[30] *Id.* at 2, 19.

[31] *Id.* at 18.

broadband information service offering, and both parties would maintain a direct customer relationship with subscribers. SBC might also seek to negotiate private carriage arrangements that would be tailored to the unique circumstances of particular ISPs; these deals might involve revenue sharing and other mutually beneficial business arrangements. SBC might also seek to enter into network-to-network interface arrangements with ISPs that are technically more efficient than the current arrangements. In all cases, SBC would be responding to "market forces"; and the Commission, by letting those responses occur, would be permitting those market forces to "guarantee efficient, customer-friendly [ISP access] arrangements."[32]

SBC thus firmly agrees with those commenters that explain that "[t]he far better course is to allow broadband service providers to choose their own business models."[33] Moreover, the pro-competitive, pro-consumer effect of lifting the Commission's existing limitations on service-design and innovation provide a direct response to those commenters that contend that the salient broadband policy issue is solely a question of *demand*, not supply.[34]

Chairman Powell has already explained that it is wrong to suggest that demand is a greater obstacle to widespread broadband adoption than the pace of broadband deployment. Rather, the issues are, in his words, "interconnected."[35] But, even if the question of demand is examined in isolation, what SBC is seeking here is the flexibility to structure its broadband information services offerings in a way that best responds to consumer needs – that is, in a way that best meets demand. The current regulatory regime adversely affects broadband technology

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[32] *Id.* at 2.

[33] Comments of Cox Communications, Inc. at 22, CS Docket No. 02-52 (FCC filed June 17, 2002) ("*Cox Cable Broadband Comments*").

[34] *E.g.*, Covad at i (the Commission's proposals "operate[] from a flawed line of reasoning that confuses the lack of broadband demand with a lack of supply").

[35] Local Competition Report, *Powell Hopes to Complete Broadband Proceeding By Year's End*, Vol. 11, No. 9 (May 6, 2002).

integration and the ability of SBC to design new and innovative services. It also requires SBC to incur additional operating costs associated with providing a stand-alone telecommunications service every time it offers an information service. By requiring that SBC offer a standardized common carrier offering separate from an information service, and thus foreclosing other innovative arrangements, the current regime handicaps SBC's ability to develop and offer new services and thereby suppresses demand. By exempting wireline broadband information services from *Computer Inquiry* requirements and declaring that all broadband services will be regulated under Title I, regardless of the delivery platform, the Commission will, among other things, give ILECs the freedom to stimulate demand.

And, again, AT&T itself has stressed this same point. It has explained that "variety in business models is necessary to address the wide disparity in consumer needs," and that "[*t*]*he flexibility that permits the market to meet all of these needs and others would be seriously undercut by the imposition of a government mandated business model requiring the provision of uniform services*."[36] SBC could not agree more. Market freedom for ILECs – the same market freedom that AT&T, AOL Time Warner, and other commenters in this proceeding enjoy – will undoubtedly spur all providers to develop new and innovative services that will stimulate demand for broadband.

2. As SBC explained in its opening comments, the costs imposed by the *Computer Inquiry* regime also distort the competitive process by diminishing wireline providers' incentives to invest in new technologies, and thereby inhibiting broadband deployment. Like any rational economic actors, wireline broadband service providers will invest in new technologies only if they conclude that those large risks could someday yield concomitantly large rewards. As the D.C. Circuit recently explained – in describing what AT&T has elsewhere identified as

[36] *AT&T Open Access NOI Comments* at 73 (emphasis added).

"fundamental economic truths"[37] – "[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid the payment for the losers, the incentive to invest plainly declines."[38]

Particularly in light of the dominance of the cable incumbents in the broadband service marketplace, this "fundamental economic truth" demands that the Commission remove the one-sided regulatory requirements that currently inhibit wireline deployment. As the CEO of Cox recently boasted, cable providers are capitalizing on their "three-trick pony" – a network that is capable of delivering video, data, and voice – to build upon their already substantial market lead.[39] Video is a critical piece of that bundle,[40] and, with today's technologies, wireline providers cannot match it. That is one of the reasons why it is now widely believed that cable "remains invincible," and "will remain the leading access platform within the consumer market."[41]

It also is one of the reasons why, to match the capabilities of existing cable networks, DSL must ultimately give way to the deployment of end-to-end fiber optic transmission facilities.[42] "The logical technological evolution of the network is the complete or near-complete

[37] *Id.* at 42, 68-69.

[38] *USTA*, slip. op. at 16.

[39] Reinhardt Krause, *Cable's Program Extends Beyond TV*, Investors' Business Daily, May 16, 2002, at A6 (quoting James Robbins, CEO, Cox).

[40] Jason B. Bazinett, J.P. Morgan Securities, Inc., *Industry Analysis: The Cable Industry* 42 (Nov. 2, 2001) ("JP Morgan Cable Industry Report") ("video/voice" is the "most popular" bundle of service desired by consumers).

[41] *See* Imran Khan, Yankee Group, *Residential Broadband: Cable Modem Remains King*, at 7, 8 (2002).

[42] *See NPRM*, 17 FCC Rcd at 3020-21, ¶ 1, 3026, ¶ 12; *see also*, *e.g.*, I. Burgess, Credit Suisse First Boston, Investext Rpt. No. 2989479, *European Telecom Equipment Weekly Update – Industry Report* at *4 (Nov. 12, 1999) ("Ultimately the limitations of copper cable ensure that the economic solution is to push fibre deeper and deeper into the network, closer and closer to the user."); M. Suydam, *Passive Aggressive*, CommVerge at 40 (May 1, 2001) ("[Passive Optical

replacement of copper lines with end-to-end fiber optic transmission facilities."[43] That will require massive new investment – as much as "$200 billion from start to finish," and it will have to be made "without a firm grasp of what services will be demanded and at what price they will be purchased."[44]

Yet SBC and other wireline providers cannot justify this investment under a one-sided regulatory regime that subjects them, and only them, to the outdated *Computer Inquiry* regime. And the Commission need not take SBC's word for it. The equipment manufacturers – who, as the D.C. Circuit has recognized, "have the incentive to make a completely unbiased judgment" on matters where, as here, they "sell goods and services that are *inputs* to the production and use of [advanced] services" and therefore "stand to gain [from] an expanding market"[45] – make precisely this point. Alcatel, for example, states that the Commission's existing regulatory structure "disparately impact[s] incumbent local exchange carriers when compared to the other widely recognized broadband platforms, such as cable television, fixed wireless, and satellite."[46] Alcatel accordingly urges the Commission to adopt a policy of "[r]egulatory parity between these platforms" in order to "spur the broadband access deployment necessary to increase innovation and place downward pressure on retail prices."[47]

Networking] is obviously much better than copper. While DSL is hot today, how long will that last? Eventually, everything will go into fiber.") (quoting Dong Liu, strategic marketing manager for networking and interface products, Agere Systems).

[43] *NPRM*, 17 FCC Rcd at 3026, ¶ 12.

[44] *The Internet Freedom and Broadband Deployment Act of 2001, Hearings Before the House Energy and Commerce Committee*, 107th Cong. (Apr. 25, 2001) (prepared testimony of Douglas Ashton, Bear Stearns & Co.).

[45] *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

[46] Alcatel at 3.

[47] *Id.* at 1.

The dominant cable incumbents make the same point. The "costs" of a mandatory access regime, they explain, are "enormous."[48] And, in view of those costs, "regulatory intervention in this area" would "create market uncertainty . . . and undermine the rapid and timely deployment of advanced services to all Americans."[49] Mandatory access would also "destroy[] investment expectations."[50] In sum, "[t]he costs and uncertainty of accommodating multiple ISPs in a manner dictated by the government rather than the marketplace would almost certainly have significant adverse effects on investment in and deployment" of broadband.[51] Indeed, "'even a hint'" of regulation "could prove disastrous" to broadband deployment.[52]

To be sure, the cable incumbents in general (and AT&T in particular) attempt to restrict their deregulatory stance to their own broadband offerings, while disingenuously encouraging the Commission to subject their nondominant wireline competitors to what they have described as the "chaos and waste" of open access regulation.[53] That is appropriate, they claim, because the "fundamental economic truth[s]" regarding investment incentives are apparently not so fundamental after all – they purportedly apply only where the broadband service at issue rides on hybrid fiber-coax, and not where it rides on copper, DLC, or all-fiber loops.[54]

[48] *AT&T Cable Broadband Comments* at 13; *see also Cox Cable Broadband Comments* at 4 (Government intervention would "impose prohibitive costs and discourage capital investment").

[49] Comments of Comcast Corp. at 4, GN Docket No. 00-185, CS Docket No. 02-52 (FCC filed June 17, 2002) ("*Comcast Cable Broadband Comments*").

[50] *Cox Cable Broadband Comments* at 19; *see also* Comments of the National Cable & Telecommunications Ass'n at 25, CS Docket No. 02-52 (FCC filed June 17, 2002) ("*NCTA Cable Broadband Comments*") ("[R]egulation that diminishes and discourages investment will stunt . . . the evolution of high-speed Internet services.").

[51] *NCTA Cable Broadband Comments* at 24.

[52] *Comcast President: Cable TV Industry Would Wither if New Rules Enacted*, TR Daily (June 10, 2002) (quoting Comcast President Brian L. Roberts).

[53] *AT&T Open Access NOI Comments* at 80.

[54] *See* AT&T at 10; *see also* Covad at 12; DirecTV at 75.

These self-serving claims are ridiculous. Indeed, these same commenters acknowledge that Bell companies already have "made significant investments" in broadband,[55] and they provide no basis on which to think these investments were driven by anything other than market-based incentives. To the contrary, the cable incumbents and others make much of the claim that the Bell companies made these investments in response to competition from cable,[56] thus confirming that it is intermodal competition that best spurs innovation and investment.

In this regard, it is nonsensical to suggest that the Commission should limit the ability of the Bell companies to respond to cable in the future on the grounds that they responded to cable in the past. Rather, the fact that Bell companies responded to cable in the past means that they are likely to continue to do so in the future. The Commission should design policies to promote such competition and investment, not to retard it. And the only way to accomplish that is to provide all competing providers the same flexibility to design and offer services, and to contract with third parties for use of their broadband facilities.

The competing broadband providers also argue that ILECs are not likely to compete aggressively in the broadband arena, even if they are deregulated, because they will be motivated

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[55] AT&T at 68-70; *see also* DirecTV at 71-72; WorldCom at 39.

[56] AT&T at 67. The facts do not support Covad's claims that the ILECs deployed DSL only in response to the data CLECs like Covad. *See* Covad at 12. As an initial matter, the BOCs began deploying DSL at roughly the same time as most data CLECs. Moreover, when the BOCs entered the market, they targeted a different customer base than the DLECs (residential as opposed to business) using a different technology (ADSL as opposed to SDSL). *See*, *e.g.*, xDSL.com, *TeleChoice 4Q01 DSL Deployment Summary* (Feb. 11, 2002), *at* http://www.xdsl.com/content/resources/deployment_info.asp (as of fourth quarter 2001, ILECs served 81 percent residential customers versus 18 percent business customers, whereas CLECs served 57 percent business customers and 42 percent residential customers); Adtran White Paper, *The Voice over DSL (VoDSL) Marketplace* at 4, *at* http://www.adtran.com/all/Doc/0/ROSPCLLJO7AH39QU038BE81ID8/CL006.pdf (last visited Jun. 28, 2002) ("Initially, the ILECs used asymmetric DSL (ADSL) as a means to target the consumer market while the DLECs used symmetric DSL (SDSL) as a target to the SME market.").

to protect revenues from existing narrowband services.[57] But, for one thing, it is the cable companies, not the ILECs, that put in place restrictions on the use of streaming video in order to protect their revenues from existing cable television service,[58] and whose "first reaction" to consumers' demand for broadband Internet access "[wa]s to protect their legacy network."[59] In any case, this claim is again directly contrary to these same commenters' claim that ILECs have *already* invested heavily in broadband. If ILECs were concerned only with protecting their primary line revenues, as the commenters claim, these investments would never have occurred. Moreover, while some customers may be giving up their second lines when they subscribe to DSL service, a far larger number are giving them up to subscribe to other, intermodal sources of broadband supply.[60] Indeed, about two out of every three new broadband connections use cable instead of DSL or other alternatives.[61] ILECs would quite obviously prefer to have a customer abandon its second line in favor of DSL than in favor of cable modem, where all of that customer's business would be lost.

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[57] *See* AT&T at 10, 65-66; DirecTV at 75; WorldCom at 27-28; Covad at 13-14; Cbeyond Communications, LLC, El Paso Communications Corporation, New Edge Network, Inc. and Pac-West Telcomm, Inc. at 12-13 ("Cbeyond").

[58] *See, e.g.*, Kurt Kleiner, *The Enemies of Innovation*, Nat'l J., Apr. 27, 2002 (some cable companies "limit the amount of streaming video customers can watch (in theory because of bandwidth considerations, but perhaps also because streaming video could be a direct threat to their TV business)"); Gary Arlen, *Suddenly, Streaming Slows Down*, Broadband Week, Mar. 5, 2001 ("If restrictions on streaming mean a better price for the core video network, that's a deal likely to be struck for now.").

[59] Richard P. Cole, *Sinking or Swimming With Streaming Video*, CableWorld, Dec. 11, 2000, at 14, 15 (quoting Chairman of Excite@Home, then owned in large part by cable incumbent AT&T), *at* http://www.enjoyweb.com/news/pdf/cableworld.pdf.

[60] *See, e.g.*, Margaret Schoener, *Gartner U.S. Residential Wireline Report* 7-9 (Aug. 31, 2001) (finding that, from January to June 2001, 6 million households (6 percent of all households) have replaced a traditional telephone access line with another form of communications line, and 61.5 percent of those 6 million have chosen wireless or cable).

[61] *See, e.g.*, R.A. Bilotti *et al.*, Morgan Stanley, Dean Witter, *Cable Modem and xDSL Conference Call* (Jan. 18, 2002).

The cable incumbents next claim that the current regime should remain in place because, in their view, it enables ILECs to earn an adequate return on their investment.[62] But the Commission should not take the word of the market leaders that secondary providers are surviving despite regulation while they, all the while, remain unregulated. Indeed, the cable companies' claim here is particularly hypocritical given their vociferous arguments that mandatory ISP access to cable facilities is expensive and anticompetitive even without regulated rates. They have taken the uncompromising position that "[c]ompetition and marketplace forces will quite simply yield procompetitive and pro-consumer outcomes far more effectively than could any regulatory requirements."[63] They should not be heard to make a different claim here.

3. The costs at issue in this proceeding are accordingly clear: by short-circuiting the competitive process, the *Computer Inquiry* regime prevents wireline providers from developing new services and responding effectively to consumer demand, and it inhibits investment by the very carriers whose aggressive deployment is necessary to provide a much-needed competitive counterbalance to the dominant cable incumbents.

A number of commenters nevertheless claim that the Commission should keep these rules in place – *not* because they are necessary or even beneficial in the broadband marketplace – but because, in their view, their existence helps to preserve state and federal common carrier regulation over *non*broadband services. The theory is apparently that SBC and other ILECs, once given the opportunity to provide broadband information services under Title I, would disguise all of their *other* services – including, in particular, basic voice services – as information services subject to that same Title I treatment.[64]

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[62] *E.g.*, AT&T at 62-63.

[63] *E.g.*, *AT&T Open Access NOI Comments* at 2.

[64] Covad at 74; Sprint at 3-4; Allegiance at 27-29.

These speculative and overblown fears are baseless. For one thing, this proceeding does not alter the existing jurisdictional classification of broadband Internet access services. As we explained in our opening comments, the FCC has already classified DSL-based Internet service as predominantly interstate and therefore subject to its own, exclusive jurisdiction. By contrast, SBC and other ILECs today provide basic voice service to local customers pursuant to intrastate tariffs. And there is no reasonable prospect that state commissions will permit ILECs to withdraw such tariffs or to provide service free of that regulation. Accordingly, any voice service offered over packet-based broadband facilities will be in addition to, not instead of, traditional regulated voice services. It may well provide increased flexibility and additional options to consumers, but it will not deprive them or the states of any benefits that arise from traditional voice regulation. Indeed, the reality is that the "radical surgery" required by the *Computer Inquiries* has already been performed on all wireline services currently offered at the federal and state level. Granting prospective *Computer Inquiry* relief – relief that would apply to *new* broadband services that are offered *in addition* to existing services – will not alter that fact.

Covad nevertheless complains that deregulation will encourage ILECs to create new and innovative services under Title I that consumers may purchase instead of existing common carrier services.[65] But that is precisely the point. To date, the Commission's one-sided regulatory rules have *discouraged* ILECs from investing in new technologies, creating new services, and providing consumers the benefits of innovation. The entire point of this proceeding is to eliminate those rules where they no longer serve any purpose. As we have explained throughout, where, as here, a market is competitive, consumers will benefit if all providers have the flexibility to design services unimpeded by regulation. And, to the extent the Commission

[65] Covad at 74.

believes that *other* markets for *other* services are not competitive, it retains full authority to regulate in the public interest.

In this respect, SBC supports Charter's position that, at least at "this very early stage in the VoIP market," the Commission should maintain a "flexible policy stance" and "consider classifying [VoIP] services as information services."[66] VoIP services are being deployed over the same networks and using the same or similar packet technologies as broadband Internet access itself. There is accordingly no reason to believe VoIP services will be any less competitive than broadband Internet access, and thus no reason to believe the Commission's intervention will be warranted. The critical point, however, is that the Commission must maintain a principled approach that applies equally across platforms. If the Commission is to exercise restraint in this regard as to the cable incumbents, it must do so as well as to wireline providers so that all competitors have the same flexibility to respond to the demands of the competitive market by creating and packaging broadband information service offerings that include VoIP capabilities.

Indeed, this common-sense principle should govern the Commission's regulation of *all* information services based on packet technology. As SBC explained in its opening Comments, new technologies are being developed that integrate transmission with content and/or information service functionality. These services fuse transmission and computer processing functionalities in ways that make it difficult, if not impossible, to separate out a pure transmission service. Existing regulatory rules effectively preclude the full use of such new technologies, and are stifling investment in these nascent technologies. In these and related proceedings, the Commission must seek to eliminate these anticompetitive impacts, and put in

[66] Comments of Charter Communications Inc. at 40-41, GN Docket No. 00-185, CS Docket No. 02-52 (FCC filed June 17, 2002); *see also id.* at 8 n.23.

place a framework that encourages *all* providers to develop and deploy new technologies that deliver cost-effective integrated broadband information services to consumers.

Moreover, if the Commission follows through on its proposal in the *Broadband Non-Dominance Proceeding* to classify ILEC-provided broadband as non-dominant – as the record there plainly requires – it will vastly mitigate any incentive to structure services to avoid Title II treatment. In that circumstance, for broadband services only, ILECs would simply have the same freedoms as other broadband service providers – including the cable providers that are dominant in the residential market, and the IXCs that are dominant in the business market – to decide how to package their services and where precisely to locate themselves on the regulatory map. Some customers may desire a broadband telecommunications service, while others may prefer a broadband information service. The provider should have the flexibility to respond to market demands. The Commission has given other operators – including DBS licensees,[67] MDS operators,[68] and satellite carriers[69] – similar freedom to position their services under one of the several different regulatory models defined in the Communications Act, and incumbent LECs already have that freedom for video.[70] In those instances, rapid technological advances, the absence of a bottleneck, and the advent of new services supported a market-driven, deregulatory

[67] Report and Order, *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 F.C.C.2d 676, 706-09, ¶¶ 78-84 (1982).

[68] Report and Order, *Revisions of Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service*, 2 FCC Rcd 4251, 4251-53, ¶¶ 1-16 (1987) ("*MDS Report and Order*").

[69] Memorandum Opinion, Order and Authorization, *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238, 1261, ¶ 56 (1982).

[70] *See* 47 U.S.C. § 571(a)(2) ("To the extent that a common carrier . . . is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of [Title II]"); *id.* § 571(a)(3) ("To the extent that a common carrier is providing video programming . . . in any manner other than that described in paragraphs (1) and (2), . . . such carrier shall be subject to the requirements of [Title VI], unless such programming is provided by means of an open video system . . . under section 573 . . . .").

approach, one that would "encourage additional entry, additional facility investment, [and] more efficient use" of resources, while "allow[ing] for technical and marketing innovation in the provision of . . . services."[71] And the market upshot has been a healthy mix of common carrier and non-common carrier services. That same result will follow here, if the Commission will only let it.

B. Any ISP Access Requirement Must Take Account of Facilities-Based Competition in the Market, and Must Be Imposed on a Uniform, Symmetrical Basis.

As in the cable context, the inapplicability of the *Computer Inquiry* rules does not necessarily mean that the Commission may not put in place a new framework – call it *Broadband I* – that sets out basic parameters to ensure end users a choice of ISPs. Any such framework, however, must take full account of the facilities-based competition in the market and, critically, it must apply across-the-board to all providers. The *Computer Inquiry* framework itself, of course, is not an option. As we have discussed above, and as the Commission has acknowledged, its "one-wire world" predicate renders it wholly unsuited to the broadband marketplace. And, in any case, the Commission has held it inapplicable to the dominant cable incumbents. Thus, as we explain below, the Commission may no longer legally apply it to wireline broadband providers.

Thus, rather than incorporating the *Computer Inquiry* framework – with its pervasive, inflexible rules, and its one-size-fits-all approach – the Commission must start anew. And, in this regard, the Commission must measure any proposed ISP access requirements against the exacting standards of section 706. As the Commission recognized in the cable context, that

[71] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d at 1255, ¶ 41; *see also Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) ("[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments" caution against "an inflexible regulatory regime").

means balancing the costs of any requirement against its expected benefits.[72] It also means taking into account Congress's mandate to "encourag[e]" the deployment of "advanced telecommunications capability" generally, not to favor any particular technology used to deliver that capability. As we have previously explained, Congress expressly defined the term "advanced telecommunications capability" to include "high-speed, broadband telecommunications capability" "*without regard to any transmission media or technology*."[73]

SBC agrees with the dominant cable incumbents that the "the best way to foster the goals of Section 706 is to allow the market to function with minimal regulation."[74] As an initial matter, however, it is important to stress that the result SBC seeks here is limited to broadband – *i.e.*, services grounded in packet-based and successor technologies – and does not encompass the traditional non-packet-based narrowband services that many ISPs use to provide Internet access. Existing tariffs will continue to apply to those dial-up Internet access services, even if broadband Internet access services are deregulated here.

More importantly for present purposes, for the ISPs that use or want to use broadband facilities, SBC is committed to offering market-based solutions that are mutually beneficial and meet (and enhance) consumer demand. As SBC has emphasized throughout, unlike the dominant cable incumbents, SBC already has business relationships with hundreds of ISPs, and it has no desire to lose those relationships or revenues. For that reason, as stated at the outset, SBC has entered into the attached MOU with the USIIA that commits SBC to negotiate and make available commercial agreements with ISPs for broadband Internet access in a deregulated environment. This memorandum reflects the fact that wireline providers and ISPs can and will

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[72] *E.g.*, *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 43, 4826, ¶ 47.

[73] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (reprinted at 47 U.S.C. § 157 note) (emphasis added).

[74] *E.g.*, *Comcast Cable Broadband Comments* at 17.

negotiate market-based agreements to provide sufficient access to wireline broadband facilities, and to ensure efficient, market-based solutions to consumer needs.

The cable incumbents, of course, say the same thing – indeed, they have been pledging to open their networks to ISPs for years. The Commission may ultimately rely on market forces, and give cable operators the freedom to seek market-based arrangements with ISPs, with minimal intervention from the Commission. If it does, of course, the Commission would have no choice but to give wireline providers the same freedoms. Simply put, if the Commission believes that the cable incumbents – with close to 70% of the market, and with a long history of operating closed networks – have the incentive and ability to provide access to ISPs, it likewise must conclude that wireline providers – with far fewer subscribers, and with a long history of productive relationships with ISPs – have the same incentive and ability.

If, on the other hand, the Commission concludes that an ISP access requirement is called for, it must face questions such as whether to require access for some or all ISPs, and what type of access to require. At least as to the latter question, the Commission should tread lightly. As we have explained above, the great virtue of eliminating the *Computer Inquiry* requirements for broadband is that it would permit wireline providers the flexibility to design new services without regard to whether a discrete transmission service can be peeled off. It would also permit these same providers to enter into innovative business arrangements with ISPs that best respond to market forces. The more the Commission interferes in the nature of broadband services and/or the structure of ISP arrangements, the more it will result in "bickering over inflexible government-mandated terms of access" and undermine the pro-competitive results that come with moving to a de-regulatory model.[75] Thus, any ISP access requirement should give

[75] *AT&T Cable Broadband Comments* at 18; *see also Cox Cable Broadband Comments* at 30 ("[A]ny access mandate is a recipe for repeated, drawn-out requests for regulatory intervention, and for Commission involvement in the minutiae of every access arrangement.").

broadband providers and ISPs maximum flexibility to enter into unique commercial arrangements that satisfy the demands of the market.

Incredibly, some commenters claim that the Commission should go in the opposite direction, and impose *more* regulations on wireline providers than those that are in place today.[76] But it simply makes no sense to *increase* regulation of the secondary provider in the market, particularly while the Commission takes steps in a parallel proceeding to deregulate the market leader. Indeed, the cable industry association recognizes as much. It notes that "DSL service and cable modem service are substitutes . . . and that they compete in the same market."[77] Thus, "any substantive policy rationale for . . . deregulation" of the one "would also militate against regulation" of the other.[78] What is more, in light of "current competition in providing broadband Internet access services, the question of forced access [for cable] does not even get to first base in an analysis of potential costs and benefits."[79] It is simply impossible to see how that cost/benefit analysis would come out any differently in analyzing wireline facilities.

Nor, critically, is there any technical basis for distinguishing between cable broadband networks and wireline broadband networks that could justify maintaining an asymmetric ISP access requirement. The cable incumbents seek to create such a basis for distinction by deceptively emphasizing theirs as the only "shared" network architecture.[80] But cable modem service and DSL service *both* utilize shared network architectures, the capacity and use of which must be managed across all end users. A similar packet-based network is used to route traffic

[76] *E.g.*, WorldCom at 53-56; ASCENT at 25-30; Big Planet at 63.

[77] Bruce M. Owen, *Forced Access to Broadband Cable* ¶ 50 (FCC filed June 17, 2002) (attached to *NCTA Cable Broadband Comments*) ("*Owen Paper*").

[78] *Id.* ¶ 13.

[79] *Id.* ¶ 29.

[80] *E.g.*, AT&T at 73-74.

between the cable headend and each ISP as is used to route traffic between the wireline central office and each ISP. Therefore, the network architectures of cable broadband networks and wireline broadband networks are functionally equivalent for purposes of providing access to multiple ISPs.

The cable incumbents nevertheless claim that ISP access is more costly for cable because of the nature of the facilities between the end user and the cable headend, on the one hand, and between the end user and the wireline central office, on the other hand. But that misses the point entirely. The nature of those facilities is *irrelevant* to the issue of providing multiple ISP access. In this regard, the cable incumbents are simply wrong to assume that access requirements would necessarily require the facilities-unbundling of cable or wireline local loops.[81] Rather, open access simply involves permitting customers to subscribe to the ISP of their choice – whether through "click-through" access or some other form of accommodating consumers' desire to reach their preferred ISP.[82] Critically, the network management issues associated with accommodating ISP choice start at the headend for cable, and at the central office for wireline companies. And, in each case, the question of access is managed from the headend/central office outwards to the ISP interconnection point, not inwards toward the customer premises.

Indeed, the cable industry association appears to concede as much. The headend, according to NCTA, is where data from the end-user is "passed to routers, which connect to a

[81] *See, e.g., Cox Cable Broadband Comments* at 19 ("The only way to impose non-discriminatory access requirements on broadband service providers is to force them all into the 'dumb pipe' transport business."); *Owen Paper* ¶ 12 ("As with DSL, a mere access requirement for cable systems is likely to be meaningless in the absence of unbundling and maximum wholesale price regulation once the Commission comes face to face with the need to adjudicate access complaints.").

[82] *See Comcast Cable Broadband Comments* at 4 ("Click-through access" permits end-users to "experience the full abundance and diversity of the entire Web.").

metropolitan area fiber network, which is connected to a national backbone."[83] That national backbone network, in turn, "carries the data packets between the metropolitan regions *and is where data are interconnected with other ISP networks.*"[84] It therefore must be the case that the *headend* – and not the customer premises – is where open access requirements come into play. Simply put, the network management issues raised by questions of open access are the same for both platforms; the only difference is that ILECs are forced to confront them on an ongoing basis as part of providing broadband Internet access services.

To be sure, there are scalability and bandwidth management issues that must be addressed as additional customers are added to broadband networks, and as those customers seek to access different types and providers of information. But that is a function of customer growth as much as ISP access, and it is a question that must be faced by wireline and cable providers alike. A broadband Internet access provider must manage scalability issues whether it does business with a single ISP or 100 ISPs. If the dominant providers of broadband Internet access services can successfully manage the scalability issues of their rapid customer expansion, it is hard to see why they cannot manage similar issues created by ISP access.

Although there is accordingly no technical reason why the cable broadband platform cannot be an "open" one, there are significant costs associated with multiple ISP access requirements that ultimately must be passed on to consumers in the form of higher rates for broadband services. The Commission has recognized some of these costs in the cable context, and the cable incumbents continue to make much of them there.[85] But, critically, those costs are the same across platforms. Their existence therefore cannot be said to lead to different

[83] *NCTA Cable Broadband Comments* at 19-20.

[84] *Id.* (emphasis added).

[85] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4808-09, ¶ 15.

cost/benefit analyses for different broadband platforms. If the Commission concludes that the costs of a mandatory access regime is too burdensome for the dominant cable providers, then it must reach the same conclusion for wireline companies.

So too with the calculation of any benefits that the Commission expects to result from a mandatory access regime. Indeed, any benefits that stem from access to wireline facilities would by necessity pale in comparison to the impact of requiring multiple ISP access for cable. The cable incumbents control close to 70% of the market. If it makes sense to mandate that ISPs have access to the wireline broadband facilities that serve less than a third of the market, it surely makes sense to mandate access to the providers that serve double that amount.

In this respect, it is simply preposterous to suggest, as AT&T does, that ISPs require access to ILEC broadband facilities because AT&T itself and its cable brethren persist in operating closed systems.[86] On that theory, asymmetrical regulation becomes its own justification, and the Commission would continue to heap burdens on wireline carriers precisely because those same burdens do not apply to their competitors. Indeed, such an approach would affirmatively encourage cable operators to continue to operate closed systems to ensure that wireline companies remain the only available alternative to ISPs and thus subject to one-sided regulation that hinders their ability to compete.

Nor can the historical classification of cable operators and wireline companies justify a lopsided ISP access regime in which the nondominant providers alone are subject to regulation.[87] It is black-letter law that services are classified based on their nature, not who happens to provide

[86] AT&T at 3.

[87] *E.g.*, AT&T at 73-74 (arguing that cable providers are entitled to special treatment for their broadband services because their *cable* services are regulated differently than incumbent LEC *voice* services).

them, or what else they happen to provide.[88] It is now settled that broadband Internet access is not a "cable service," and virtually undisputed that it *is* an "information service" – regardless of the type of facilities that are used to provide it. As a result, the Commission's regulation of cable modem service will have nothing to do with the statutory classification of other services also provided by cable operators, but rather will be dictated by the Commission's policy determinations regarding the regulatory framework that is appropriate for a nascent service in a vibrantly competitive market. The Commission must regulate DSL service the same way. Any other result would amount to a "regulatory distinction[] based purely on technology" – which, as the Commission has rightly proclaimed, must be avoided.[89]

In sum, the Commission must consider the question of ISP access on a principled basis, in a manner that takes full account of the competitive nature of the market. The regulatory costs of a mandatory ISP access regime are clear, and they apply across-the-board: to cable and wireline providers alike: (i) it would increase the cost of deployment, thus driving up prices and diminishing demand; (ii) it would inhibit the development of innovative business relationships, thus preventing development of the most efficient, commercially viable form of ISP access; and (iii) it would enmesh the government in the market, thus interjecting uncertainty, delay, and disputes into what would otherwise function as a competitive market. By the same token, the benefits – while certainly not as clear-cut – are likewise comparable in kind regardless of the underlying platform, and, if anything, are more extensive with respect to cable because of its dominant market share. Whatever conclusion the Commission reaches regarding ISP access to the cable platform, it must reach the same result for wireline providers.

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[88] *See, e.g.*, *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

[89] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11548, ¶ 98 (1998) ("*Universal Service Report to Congress*").

II. AS A MATTER OF LAW, THE COMMISSION MUST ADOPT A CONSISTENT REGULATORY FRAMEWORK FOR ALL COMPETING BROADBAND SERVICES

It is accordingly clear that, as a policy matter, the *Computer Inquiry* requirements should be held inapplicable to wireline broadband regulation, and that any ISP access requirement imposed by the Commission must apply equally to all facilities-based broadband service providers. It is equally clear that this deregulatory, uniform approach is the only one that is *legally* sustainable.

A. The key here is, again, the Commission's recent *Cable Broadband* decision. Having refused there to mandate that the *Computer Inquiry* rules apply to cable broadband information services, the Commission has no lawful choice other than to reach the same result here. SBC explained at length in its opening comments that basic principles of administrative law and clear congressional intent require the agency to treat like services alike, and thus mandate the same relief for wireline that the Commission has granted to cable broadband. Other commenters have correctly emphasized the same point.[90]

Since those comments were filed, this argument has become even stronger. The D.C. Circuit's *USTA* decision vacating the Commission's line-sharing rules is directly relevant here and further fortifies the conclusion that the Commission is duty-bound to consider the broadband market as a whole, not to cabin its analysis artificially to wireline broadband providers.

As discussed above, the D.C. Circuit's analysis started with the incontrovertible fact that, as this Commission has repeatedly concluded, it is cable, not wireline, that is the market leader in broadband.[91] The court then stated unequivocally that the Commission must consider that market reality in determining appropriate wireline broadband regulation: in view of the "robust

[90] *E.g.*, Verizon at 23-30; BellSouth at 13-15; Alcatel at 3-5.

[91] *USTA*, slip op. at 22.

competition" and the "dominance of cable" in the broadband market, any other approach would be "quite unreasonable."[92]

If anything, that analysis is even more apt here. Given the Commission's express conclusion that it is not necessary to competition to require cable providers to peel off a telecommunications service from their broadband information services – indeed, that such an obligation would be contrary to the public interest – it would be the height of arbitrariness to maintain those same rules for secondary providers. The Commission would again be acting not just in "naked disregard of the competitive context"; and not just without any basis to conclude that its decision would lead to a "significant enhancement of competition"; but also in the teeth of an explicit conclusion that *not* applying the same regulation to the market leaders is in the public interest. The D.C. Circuit's decision establishes beyond doubt that such a course is legally indefensible.

B. Some commenters – primarily the dominant cable incumbents that have the most to gain from a one-sided regulatory regime – disagree. As a general matter, these companies can hardly be credited here. Their chief interest is quite evidently to protect their *regulatory* advantages, in the hopes that those advantages will forestall the need to compete head-to-head, under the same rules, in the marketplace. Indeed, in another context – where the cable companies were subject to regulation that their DBS competitors did not face – the cable industry asserted that "considerations of parity" dictated that all market participants bear "the same regulatory responsibilities" – *i.e.*, that "everyone should play by similar rules."[93] The cable incumbents' scatter-shot arguments for a different result here are wholly misguided.

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[92] *Id.* at 22, 23.

[93] Prepared Statement of Decker Anstrom, President, National Cable Television Association, Before the Senate Committee on the Judiciary, 1997 WL 705321, at *7 (Nov. 12, 1997).

1. Commenters first seek to defend the existing state of regulatory disparity on the ground that wireline providers have historically been required to peel off a stand-alone telecommunications service from information service offerings. Such historical treatment, the argument goes, requires the Commission to continue to mandate such "radical surgery" in the wireline broadband context.[94]

That is simply wrong. The Commission regulates to serve the public interest, not as a result of historical accident, and there is no legal principle requiring the Commission to be a prisoner to its prior determinations in different market, legal, and technological circumstances. The only sound basis for continued regulation here would be the conclusion that wireline providers maintain bottleneck control over broadband information service facilities. Indeed, AT&T, WorldCom, and other commenters concede that the control of "bottleneck facilities" is the fundamental prerequisite for *Computer Inquiry* regulation and, more generally, for Title II common-carrier requirements. WorldCom thus proclaims that "the only sound policy justification" for abandoning *Computer Inquiry* regulation is that "last-mile transmission facilities are no longer bottleneck facilities."[95] AT&T similarly admits that the *Computer Inquiry* "unbundling and nondiscrimination requirements flow from the Commission's recognition that, without such requirements, incumbent LECs that provide information services have both the incentive and the ability to use their control over *bottleneck transmission facilities* to distort information services competition."[96]

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[94] *E.g.*, AOL Time Warner at 6-12; AT&T at 13-21; WorldCom at 58-63.

[95] WorldCom at 32.

[96] AT&T at 40 (emphasis added). *See also* WorldCom at 70 ("[T]he Commission also has long held that such 'contamination,' whereby telecommunications services lose their common carrier characteristics when they are bundled with enhanced services, cannot be applied 'to the services of . . . [a] facilities-based carrier,' *controlling bottleneck facilities*, since to do so 'would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework.")

These concessions are dispositive. As the D.C. Circuit confirmed, this Commission has *already* concluded on several occasions that the BOCs are secondary providers in the distinct mass-market for broadband Internet access services. The D.C. Circuit's conclusion is amply supported. The Commission has long understood that the broadband market "accommodat[es] different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio."[97] "The most popular offering of broadband to residential consumers is via 'cable modems,' offered by cable television companies within their cable service territories."[98] The Commission further stated that there has been "a continuing increase in consumer broadband choices" both within and among "the various delivery technologies — xDSL, cable modems, satellite, fixed wireless, and mobile wireless," and that "[t]he last mile connection to the end-user can take the form of cable modem service, digital subscriber line service (DSL) or some other LEC-provided service, terrestrial wireless service, or satellite service."[99] These findings cannot be disregarded here.[100]

(emphasis added); *Owen Paper* at i ("the presence of established, otherwise intractable monopoly power" is a "necessary condition" for open access requirements).

[97] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2414, ¶ 35, 2423, ¶ 48 (1999) ("*First Advanced Services Report*").

[98] *Id.* at 2426, ¶ 54.

[99] *Fixed Wireless Competition Order*, 15 FCC Rcd at 11865, ¶ 19; Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 15 FCC Rcd 20913, 20928, ¶ 28 (2000).

[100] *See Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (the Commission may not in one proceeding "ignore[] the implications of its findings" in another proceeding); *see also, e.g.*, *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1269 (D.C. Cir. 1996) ("the Commission may not ignore its own findings").

Nor is a different result permissible in the broadband business market. As SBC has demonstrated at length in the *Triennial Review* and *Wireline Broadband Non-Dominance* proceeding, the Bell companies lag well behind AT&T and other IXCs in that market. It therefore makes no sense to subject the Bell companies to special regulatory disabilities.

2. Commenters' reliance on the 1996 Act's legislative history is equally unavailing. In particular, WorldCom and Allegiance argue that the legislative history of the 1996 Act demonstrates that "Congress understood that there would *always* be a telecommunications service underlying an information service,"[101] even when an ILEC offers a bundled service to consumers. WorldCom quotes a 1995 Senate Report that explains that the definition of "telecommunications service" does not include "'those services . . . that are defined as information services.'"[102] The Report further states that "[t]he underlying transport and switching capabilities on which these interactive services are based, however, are included in the definition of 'telecommunications services.'"[103]

As an initial matter, however, to the extent this argument has any merit – which, as discussed below, it does not – it applies equally to *all* facilities-based broadband information service providers, including the cable incumbents. Yet, as discussed above, the Commission already reached a different result in the *Cable Broadband* context. It cannot reverse course here (at least not unless it does so across-the-board).

But in any case, the argument is wholly without merit. The Senate Report in question referred to a definition of "telecommunications service" that was *never enacted into law*. At the time the Senate issued this report, the definition of "telecommunications service" expressly

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[101] WorldCom at 66 (emphasis added); *see also* Allegiance at 12.

[102] WorldCom at 66 (quoting S. Rep. No. 104-23, at 18 (1995)).

[103] *Id.*

stated that "[t]he term includes the transmission, without change in the form or content, of information services and cable services, but does not include the offering of those services."[104] The definition of "telecommunications service" ultimately passed by Congress, however, omitted this language from the definition.[105] Thus, if anything, the legislative history demonstrates that Congress expressly *rejected* a definition of "telecommunications service" that included this type of transmission. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[106]

Moreover, even if the Commission were to consider this legislative history as pertinent to the language ultimately enacted by Congress, it says nothing about how *bundled* broadband services should be treated. While WorldCom claims this discussion proves that the Senate believed there is *always* a telecommunications service underlying an information service, the Senate Report never makes such an unequivocal statement. On the contrary, the most natural reading of this legislative history is that it was referring only to the situation where stand-alone transmission is offered for a fee directly to the public. Indeed, immediately after the portion quoted by WorldCom, the Report states that "telecommunications service" "means the offering of telecommunications for a fee directly to the public."[107] As the Commission concluded in the *Cable Broadband Declaratory Ruling*, Congress did not intend "telecommunications services" to

[104] S. Rep. No. 104-23, at 79 (1995).

[105] *See* 47 U.S.C. § 153(46).

[106] *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted); *see also Chickasaw Nation v. United States*, 122 S. Ct. 528, 534-35 (2001); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

[107] S. Rep. No. 104-23, at 18 (1995).

encompass a bundled offering where the telecommunications component is not "separable from the data-processing capabilities of the service."[108]

3. Some commenters also mistakenly claim that, because some wireline providers offer tariffed transmission offerings today, the *NARUC* decisions mandate that these offerings continue to be provided on a common carrier basis, regardless of how the Commission regulates other broadband service providers.[109] *NARUC I* established a test for identifying common carriage: "first, whether there will be any legal compulsion . . . to serve indifferently," and, "second, whether there are reasons implicit in the nature of the [the service] to expect an indifferent holding out to the eligible user public."[110] The first prong plainly does not apply. The only "legal compulsion" here emanates from the *Computer Inquiry* rules, which, as discussed above are both unnecessary and anticompetitive in the context of wireline broadband information services. Once they are eliminated in this context, they obviously will not "compel" a common carrier DSL transport offering.

As to the second prong, there is nothing "implicit in the nature" of broadband services that would require BOCs to provide them on a common carrier basis. In this respect, the critical question is whether the public interest can plausibly be understood to *require* common carriage. As AT&T explained more than a decade ago – before its efforts to play both sides of the fence discredited its advocacy in this arena – "[n]othing in the Communications Act requires the Commission to regulate under Title II the provision of all telecommunications services, without regard to the public interest and the manner in which they are offered."[111]

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[108] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4823, ¶ 39.

[109] *See, e.g.*, WorldCom at 62-63; AT&T at 22-29; Earthlink at 16-17.

[110] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*").

[111] Comments of AT&T Corp. at 73, CC Docket No. 90-132 (FCC filed July 3, 1990) ("*AT&T 1990 Comments*").

As the Commission found in the *Cable Broadband* case, the public interest plainly permits – indeed, *requires* – the Commission to conclude that broadband transmission need not be offered on a common carriage basis. We emphasized above and in our opening comments the undeniable benefits – on both supply and demand sides – that will come with removing the Title II shackles from ILEC broadband.[112] AT&T itself has identified others, including that "competitors would be unable to gain access through the regulatory process to each other's rates for private carriage services," and that "competitors would be unable to interfere with the conduct of private carriage business through the filing of unnecessary and burdensome regulatory complaints."[113] Moreover – and perhaps more importantly – "customers would be able to rely on receiving the benefits of their bargains with vendors, without fear of supervening regulatory action."[114]

In short, the Commission is not – and cannot be – captive to history. The fact that the Commission erected a regulatory structure for wireline carriers in different legal, technological, and competitive circumstances provides no basis to maintain those rules today. On the contrary, the Commission has a legal duty to align its regulation of like services, and it should have adopted the deregulatory initiatives considered here long ago. To avoid similar circumstances in the future, the Commission must act now to make clear that regulation created for the one-wire world will not apply to broadband.

4. The competing broadband providers also attempt to justify the existing state of regulatory disparity on the false factual predicate that Bell companies' have market power in

[112] *See supra* pp. 10-17.

[113] *AT&T 1990 Comments* at 75 n.***.

[114] *Id.*

voice services, while cable companies lack such power in *video* services.[115] But, for one thing, the fallacy of this argument is demonstrated by the fact that the basic *Computer Inquiry* service-unbundling rules apply to *all* wireline carriers, even those that "lack[] market power."[116] And, in any case, even assuming the premise to be true – and, as the Commission's own numbers demonstrate, it is not[117] – it would hardly justify subjecting ILEC broadband services to unique regulatory handicaps. Decades of antitrust precedent, Commission regulation, and congressional pronouncement have affirmed precisely the opposite approach – mandating open access to the "bottleneck," "essential," or competitively "necessary" network elements and services, while deregulating the competitive ones. Indeed, the cable industry admits as much. The point of access regulation, they acknowledge, is "to encourage competition" in the provision of the "value added services" for which the regulated facility is an "essential input or component."[118] No one is suggesting that broadband transmission is an "essential input" to ILEC-provided voice service, nor could they. To the contrary, the Commission has repeatedly found that broadband Internet access is a separate product in a separate and fully competitive market. The cable incumbents' efforts to bootstrap regulation from the distinct voice market accordingly fails.

[115] *E.g.*, AT&T at 75; *Owen Paper* ¶ 16 ("[t]he current regulation of DSL can best be understood in the context of efforts to encourage facilities-based competition in local telephone service").

[116] *See* Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418, 7421, ¶ 4 (2001).

[117] *Compare* Eighth Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1247, ¶¶ 5, 7 (2002) (estimating cable video programming market share of 78%, and noting that cable MVPDs continue to experience significant subscriber growth) *with* Comments of SBC Communications Inc., Att. B, CC Docket Nos. 01-338, 96-98 & 98-142 (FCC filed Apr. 5, 2002) (estimating CLEC line share in SBC regions between 14.8 and 18.6%) *and id.* Att. A at I-1 (noting that, for three years in a row, incumbent LECs have experienced negative growth in the number of access lines served).

[118] *Owen Paper* ¶ 15.

5. Commenters next point to a handful of purported behavioral distinctions that, they claim, warrant disparate regulatory treatment for wireline providers. These claims are in all cases unsupported, and in some cases downright bizarre.

Thus, for example, in a remarkable feat of projection, AT&T accuses Bell companies of creating "a hostile environment for broadband ISPs" and "deny[ing] customers broadband ISP choice."[119] This is the same AT&T that has spent the last four years fighting tooth-and-nail against even the most rudimentary open access obligation. And it is the same AT&T that, in the absence of such an obligation, has steadfastly refused to provide virtually *all* ISPs *any* access whatsoever to its vast cable network. SBC, by contrast, has consistently provided open access to ISPs, and has firmly committed that, even in the absence of regulatory mandates, it will negotiate mutually beneficial terms to continue doing so.[120] In light of this history, AT&T's claims – which in all events are unaccompanied by support of any kind – are simply absurd.

Some commenters also point to isolated instances of DSL price increases, and take from that spotty data the conclusion that ILEC DSL offerings are not constrained by competition.[121] This claim is spurious. To be sure, market power can sometimes be inferred from *consistent* prices hikes *over time* – say, for example, price increases (like the cable companies') that outpace inflation over a series of years.[122] But commenters have not provided anything remotely resembling such a consistent practice of increasing rates. Instead, their so-called "market

[119] *AT&T Cable Broadband Comments* at 24.

[120] *See* SBC at 5.

[121] *See* AT&T at 68; Allegiance at 22-23; WorldCom at 38.

[122] *See, e.g.*, *McCain Asks for GAO Study on Rising Cable Rates*, TR Daily, Apr. 16, 2002 ("'There are two signs of spring in Washington: the arrival of . . . the cherry blossoms, and the release of the FCC report that cable rates have risen during the previous year. . . . Consumers have a right to know why cable rates continue to climb faster than the rate of inflation.'") (quoting Senator John McCain).

evidence" consists of individual carriers' individual pricing adjustments, made in the ordinary course of offering a new service. As AT&T and WorldCom – both of which sharply increased rates to long-distance customers recently[123] – should understand, such pricing behavior is fully consistent with a competitive market.

More fundamentally, if anyone has exhibited price power in the broadband mass market of late, it is the dominant cable operators. Over the last year, the price of cable modem service has risen faster on a percentage basis than DSL-based Internet access.[124] And AT&T – while claiming that "'we take our cues from what the market tells us'"[125] – recently imposed a unilateral $7 per month price increase on its modem-owning customers.[126] Thus, again, if the Commission feels compelled to regulate broadband Internet access, it must start with the dominant cable incumbents.

Relatedly, Comcast accuses "the telephone companies [of] a long history of resisting competition, including violations of the antitrust laws."[127] Significantly, Comcast can provide no citation or support for this reckless allegation. By contrast, there is no dearth of either when it comes to the cable industry's well-documented violations of competition laws.[128] Coupled with

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[123] *See, e.g.*, Sam Ames, *AT&T, MCI Boost Long-Distance Fees*, CNET News.com (Jan. 2, 2002), *at* http://news.com.com/2100-1033-277503.html.

[124] *See* Rachel Konrad, *Modem Owners Pay More for AT&T*, Cnet News.com, May 28, 2002, at 2, *at* http://news.com.com/2102-1033-923512.html ("cable broadband Internet prices rose 12 percent in 2001. . . . Consumer DSL prices rose 10 percent during the same time frame.").

[125] Communications Daily at 7, May 30, 2002 (quoting AT&T spokeswoman).

[126] Konrad, *Modem Owners Pay More for AT&T*, at 1.

[127] *Comcast Cable Broadband Comments* at 26.

[128] *See, e.g.*, *United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70562 (S.D.N.Y. 1994); *New York v. Primestar Partners, L.P.*, 1993-2 Trade Cas. (CCH) ¶ 70403 (S.D.N.Y. 1993). The defendants in these cases included Comcast Corp., Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corp., Tele-Communications,

the cable industry's steadfast refusal to provide access to ISPs, this history establishes that, if anyone ought to be subject to the oversight of the Commission, it is the dominant cable incumbents.

6. Finally, AT&T contends that a one-sided ISP access requirement is necessary to further the statutory interest in "'diversity of media voices.'"[129] Given AT&T's long history of refusing to provide ISPs access to its captive cable customers, its claimed interest in facilitating a "diversity" of voices is particularly hypocritical. In any case, it is impossible to see how an access requirement applicable to 30% of the market would further that interest, but a requirement encompassing the remaining 70% would not. Moreover, AT&T has elsewhere made much of its claimed First Amendment rights to *limit* such diversity by denying ISPs carriage on its closed cable systems. In AT&T's view, "any requirement forcing cable operators to provide access to competing ISPs is subject to heightened scrutiny that a forced access requirement would clearly fail."[130] If that is so for AT&T and the other dominant cable incumbents, it must be more so for the nondominant Bell companies.[131]

Inc., Time Warner Inc., Viacom, Inc., and GE American Communications, Inc. (a subsidiary of General Electric). *See also* Proposed Final Judgment and Competitive Impact Statement, *United States v. Tele-Communications, Inc.*, 59 Fed. Reg. 24723, 24727 (May 12, 1994); Decision and Order, *Time Warner Inc., a Corporation; Turner Broadcasting System, Inc., a Corporation; Tele-Communications, Inc., a Corporation; and Liberty Media Corporation, a Corporation*, Docket No. C-3709 (FTC Feb. 3, 1997).

[129] AT&T at 54-55 (quoting 47 U.S.C. § 257(b)).

[130] *E.g.*, *AT&T Cable Broadband Comments* at 20.

[131] *See* Verizon at 27-30.

III. INFORMATION-SERVICE CLASSIFICATION OF WIRELINE BROADBAND INTERNET ACCESS DOES NOT ALTER THE MARKET-OPENING PROVISIONS OF THE 1996 ACT.

SBC's opening comments explained that wireline broadband Internet access services are "appropriately classed as information, rather than telecommunications, services."[132] That conclusion is virtually undisputed.[133] Less consistent, however, are commenters' views on the impact of that conclusion on the unbundling and resale requirements set out in section 251(c) of the 1996 Act.

A. Commenters first disagree on the impact of information-service classification on ILECs' obligations to unbundle network elements. The definition of "network element" extends only to facilities "used in the provision of a telecommunications service." 47 U.S.C. § 153(29). As we explained in our opening comments, because a broadband information service is not such a "telecommunications service," it follows that unbundling obligations cannot apply to facilities used exclusively to provide such services. A number of commenters dispute this reading, reasoning that the relevant limitation in section 153(29) – *i.e.*, "used in the provision of a telecommunications service" – refers to the use the *CLEC* intends to make of the facility, not the use the ILEC actually makes of it.[134]

For the reasons stated in our opening comments, we believe these commenters' reading of the statute is incorrect. In the wake of the D.C. Circuit's decision vacating the Commission's line-sharing rules, however, the question is purely academic. The D.C. Circuit decision makes unambiguously clear that the Commission may no longer impose unbundling obligations while

[132] *Universal Service Report to Congress*, 13 FCC Rcd at 11536, ¶ 73; *see* SBC at 16-18.

[133] *See, e.g.*, AT&T at 12 ("as the *Notice* tentatively concludes, it makes no difference if the provider owns the underlying transmission facilities").

[134] *E.g.*, AT&T at 31; WorldCom at 76; Cbeyond at 25; Allegiance at 41-42 .

"indifferen[t] to . . . the state of competition in the market." *USTA*, slip op. at 23. Stressing the undeniable costs of unbundling – "including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource" – the Court firmly admonished the Commission to cease ordering unbundling in "naked disregard of the competitive context." *Id.* at 23-24. As the records in the *Non-Dominance* and *Triennial Review* dockets make plain, the relevant "competitive context" features an array of facilities-based providers, including the dominant cable operators that control approximately two-thirds of the mass market. Accordingly, for the reasons explained in detail in those proceedings, it is impossible to conclude that unbundling of any broadband facilities – much less facilities used by ILECs exclusively in the provision of broadband information services – would lead to "a significant enhancement of competition." *Id.* at 24. And, because those records so plainly establish that the costs of unbundling broadband facilities would outweigh any conceivable benefit, the Commission need not at this time resolve the statutory question of whether, as a statutory matter, it is entitled to do so.

At the same time, the Commission should make clear that a CLEC may not obtain a UNE solely to provide an information service. The plain language of section 251(c)(3) permits access to an unbundled elements only if the CLEC is using it "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). Accordingly, AT&T's suggestion (at 32) that it is entitled to use an unbundled loop to provide an information service alone (through an affiliated ISP) is incorrect.

B. Also at issue is the resale obligation set out in section 251(c)(4). Here, the matter is considerably more straightforward, and the Commission should simply confirm the unremarkable proposition that, once broadband Internet service is properly classified as a "telecommunications service," section 251(c)(4) simply does not apply. Few commenters dispute that conclusion, and those that do rely on an incorrect reading of the statute.[135]

By its terms, the resale obligation of section 251(c)(4) extends only to "telecommunications services." *See* 47 U.S.C. § 251(c)(4). Because broadband Internet access does not "meet[] the statutory definition of a 'telecommunications service,'" it need not be made available for resale pursuant to section 251(c)(4).[136] Moreover, even if the Commission were to disregard its holding in the *Cable Broadband Declaratory Ruling* and conclude that ILECs must peel off the transmission underlying broadband Internet access and provide it to ISPs as a "telecommunications service," the section 251(c)(4) obligation would *still* be inapplicable. That obligation applies only to telecommunications services "provide[d] *at retail*." 47 U.S.C. § 251(c)(4) (emphasis added). As the Commission has already found, DSL-based transmission offered to ISPs for inclusion in an information-service offering is a *wholesale* service – not a retail one – and is therefore beyond the scope of section 251(c)(4).[137]

Recognizing this, ASCENT contends that the Commission should reverse that determination, and conclude that DSL transmission provided to ISPs is in fact a retail offering.[138] But ASCENT provides no coherent rationale to support such a reversal. As the Commission has explained, even if "tariffed," a "DSL telecommunications transport service to unaffiliated

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[135] *E.g.*, Cbeyond at 24; Florida PSC at 11.

[136] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15934, ¶ 871, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

[137] *See* Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 (1999), *aff'd, Association of Communications Enters. v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

[138] ASCENT at 6-17.

[ISPs]" is a "wholesale service offering."[139] Indeed, as other commenters acknowledge, even assuming that DSL provided to ISPs is a "telecommunications service," the ISPs "resell" that service to end users in the form of a bundled information service.[140] If the ISP is engaging in such "resale," it is impossible to say that the service provided by the ILEC is offered "at retail."

Nor is there any merit to the contention that the Commission's proposals here involve forbearance, because application of its existing precedent requires ILECs to offer information services under section 251(c)(4).[141] For one thing, the Commission has never held that ILECs must make available for resale the bundled information services that they provide at retail to end-users. On the contrary, with respect to resale, "[t]he Commission has not addressed the situation where an incumbent LEC does not offer DSL transport at retail, but instead offers only an Internet access service."[142] Thus, to the extent commenters suggest that the course explained above would amount to a reversal of position,[143] they are mistaken.

Even were that not the case, moreover, the steps the Commission has proposed would not involve forbearance. To "forbear" from applying the statute in this context, the Commission must conclude that it applies in the first place. But the steps discussed here and in our opening comments involve nothing more than interpretation of the language of the 1996 Act. To suggest that the conclusions that stem from such interpretation requires "forbearance" is to argue that a

[139] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16, FCC Rcd 20719, 20758, ¶ 80 ("*Missouri/Arkansas Order*").

[140] *E.g.*, Teletruth at 41.

[141] ASCENT at 5-9.

[142] *Missouri/Arkansas Order*, 16 FCC Rcd at 20758-59, ¶ 82.

[143] ASCENT at 5-9; NewSouth at 18-19; Covad at 72.

baseball umpire, when calling a pitch out of the strike zone a "ball," is forbearing from calling it a "strike."

Nor, finally, is there any merit to commenters' reliance in this regard on the D.C. Circuit's decision in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).[144] The court there *assumed* – but did not hold – that broadband transmission that is *not* bundled with content is a telecommunications service and is therefore subject to section 251(c)(4). That assumption clearly does not bind the Commission, and in any case has nothing to do with the question whether self-provided broadband transmission that *is* bundled with content should be regulated under Title I. What is more, the court in *ASCENT* stressed that, "[i]f an ILEC has no market power over advanced services" – as is undoubtedly the case – regulation of its broadband offerings is a "*non sequitur*."[145] To the extent *ASCENT* is relevant at all, that is the message the Commission should take to heart.

IV. THE COMMISSION SHOULD PREEMPT STATE AND LOCAL REGULATION OF BROADBAND INFORMATION SERVICES.

As SBC explained in its opening comments, the Commission must act authoritatively to ensure that its uniform, comprehensive framework is not undermined by piecemeal state regulation. There is no serious dispute that the Commission has the authority to preempt state regulation of information services. It did so in connection with the *Computer Inquiries*, and, as the ICC explains, "[a] unanimous panel of the Court of Appeals for the D.C. Circuit upheld the Commission's authority" to do so.[146]

[144] *E.g.*, ASCENT at 5 n.8; NewSouth at 10.

[145] 235 F.3d at 668.

[146] Illinois Commerce Commission at 21 (citing *Computer and Communications Indus. Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982)); *see also*, *e.g.*, Michigan PSC at 3 ("there is nothing in Title I that gives the states any specific role to ensure open access for ISPs").

The Commission has further held that "when xDSL transmission is used to provide Internet access services, these services are predominantly interstate, and thus, subject to Commission jurisdiction."[147] Nevertheless, as SBC has explained, a number of state commissions have initiated proceedings with the purpose of regulating DSL-based services at the retail level.[148] Preemption of these initiatives – and any others like them – is absolutely critical to the Commission's efforts to rationalize broadband regulation.

Here again, SBC agrees with the dominant cable incumbents, who fear a "patchwork quilt of disparate state and local rules regarding customer service, privacy, or any other element" of broadband Internet access.[149] Since "the Act reserves no legal authority for state and local governments to regulate this interstate information service,"[150] the Commission "should clarify that state and local efforts to impose additional requirements" on providers of "interstate information service[s]" are "preempted."[151]

Indeed, as the Commission has observed, the very point of this proceeding is to "build the foundation for a comprehensive and consistent *national* broadband policy."[152] A balkanized regulatory regime, in which state commissions are free to second-guess the Commission's judgments, is flatly inconsistent with that goal. As the Commission's staff has already

[147] *NPRM*, 17 FCC Rcd at 3047-48, ¶ 62 (citing Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTE Transmittal No. 1148*, 13 FCC Rcd 22466 (1998)).

[148] *See* SBC at 33-34.

[149] *Comcast Cable Broadband Comments* at 5.

[150] *Cox Cable Broadband Comments* at 4.

[151] *Comcast Cable Broadband Comments* at 27.

[152] *NPRM*, 17 FCC Rcd at 3023-24, ¶ 8 (emphasis added).

explained, "[i]nconsistent local regulation potentially can disrupt the Commission's national broadband policy and keep broadband technologies out of the hands of many Americans."[153]

V. THE COMMISSION SHOULD RESOLVE OTHER ISSUES IN A MANNER CONSISTENT WITH ITS CORE DEREGULATORY PRINCIPLES FOR BROADBAND.

A. Law Enforcement and National Security

A few commenters raise concerns about the impact on national security of permitting ILECs to provide broadband services free of the *Computer Inquiry* rules.[154] At the outset, it is important to stress that, as with the other issues raised in this proceeding, this is not a wireline-specific issue. On the contrary, the statutes at issue here – like the Communications Act itself – makes classifications based on the *type* of service offered, not on the facilities that happen to provide that service, or the corporate history of the service provider. Accordingly, any concerns regarding national security must be resolved on an industry-wide basis that takes into account all providers of broadband information services.

In any case, if the Commission concludes – as it must – that wireline broadband Internet access service is an information service, it should have a limited impact on law enforcement's technical surveillance power under CALEA. As the FBI and DOJ explain in their comments, CALEA is intended "to preserve the government's *technical* capability to conduct electronic surveillance" by requiring providers to "design or modify their systems . . . to ensure surveillance capabilities."[155] That technical capability should remain intact once wireline broadband services are properly classified under Title I.

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[153] FCC Staff Report, *Broadband Today* at 43 (Oct. 1999).

[154] Secretary of Defense at 2-8; DirecTV at 36-38; Cbeyond at 41-43.

[155] Department of Justice and Federal Bureau of Investigation at 4.

First, all BOC facilities that are jointly used for the provision of telecommunications and information services will remain subject to CALEA. Because the local loop facilities that support DSL transport are typically utilized to provide voice service on a common carrier basis as well, those joint-use facilities will continue to offer surveillance capabilities to law enforcement officials, as the FBI and DOJ request.[156] The same analysis, of course, would apply to upgraded cable facilities, which are typically capable of providing not just cable modem service, but cable telephony as well.

Second, the FBI and DOJ need not worry that broadband facilities will replace the traditional telephone infrastructure in its entirety and thereby take those facilities outside of CALEA's rubric.[157] Congress expressly provided for this situation, making clear that the term "telecommunications carrier" includes "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter."[158] In the event that traditional telecommunications services are increasingly provided over broadband facilities (whether operated by ILECs, cable operators, or others), the Commission plainly retains jurisdiction to classify the service providers as "telecommunications carriers" for purposes of CALEA.

The only situation where the government will not have surveillance access is the situation where an entity – be it an ILEC or a cable operator – knowingly provides *only* information

[156] *Id.* at 6-7.

[157] *See id.* at 7 (expressing concern that "[t]he need for the Commission to maintain CALEA's applicability to broadband facilities becomes all the more apparent when it is considered, as the Commission suggests, that such facilities could eventually replace the traditional telephone infrastructure").

[158] 47 U.S.C. § 1001(8)(B)(ii).

services over a facility. But this proceeding does not create that limitation: CALEA itself does so by excluding from its definition of "telecommunications carrier" "persons or entities insofar as they are engaged in providing information services."[159] Thus, while a ruling by the Commission in this proceeding that wireline broadband Internet access service is an information service will clarify that these services in particular do not fall under CALEA, it was Congress that made the decision to treat "information services" differently than voice services. As the D.C. Circuit explained, "Congress intended CALEA to 'preserve the status quo'" and not cover "'information services' such as e-mail and internet access."[160]

But Congress did not leave law enforcement without the proper tools. There are a number of other surveillance statutes, and the Commission's ruling in this proceeding or the parallel cable proceeding will have no effect on the government's power under those statutes. For example, the government retains its power under the USA PATRIOT Act to obtain subscriber information from any provider of "electronic communications," which is broadly defined to include "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce."[161] The government's power under the Electronic Communications Privacy Act,[162] the Computer Fraud and Abuse Act,[163] and the Foreign Intelligence Surveillance Act,[164] also remains unchanged.

[159] *Id.* § 1001(8)(C)(i).

[160] *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000).

[161] 18 U.S.C. §§ 2510(12), 2703.

[162] *Id.* §§ 2510-2522.

[163] *Id.* § 1030.

[164] 50 U.S.C. §§ 1801-1811.

Finally, although the Secretary of Defense raises concerns with national security and emergency preparedness needs if broadband wireline Internet access is classified as an information service,[165] that concern applies equally to the dominant cable providers that carry the vast bulk of broadband Internet traffic. And, in any case, the Department of Defense concedes that the Commission can use its ancillary jurisdiction under Title I "to assure the continued availability of NS/EP communications."[166]

B. Universal Service

As the Commission made clear in its *NPRM*, its universal contribution policies must be in the "public interest" and must "be equitable and nondiscriminatory."[167] Accordingly, as SBC argued in its initial comments, the Commission must modify its existing universal service rules so that *all* broadband platforms compete on a level playing field. That means, at a minimum, eliminating the existing disparity between cable modem providers and other broadband Internet access providers in the assessment of universal service contributions. Simply put, the Commission must put all such providers in the same boat. And, in order to provide parity and ensure the stability and sufficiency of universal service support, SBC recommends that the Commission use its authority under section 254(d) to require ISPs that provide interstate transport and/or broadband information access to an end user to contribute to universal service.

1. The Contribution Obligation of Competing Broadband Internet Access Services Must be Harmonized.

As SBC explained in its initial comments, under the Commission's current universal service rules, wireline providers are required to contribute to universal service based on the

[165] Secretary of Defense at 8.

[166] *Id.*

[167] *NPRM*, 17 FCC Rcd at 3053, ¶¶ 76-77.

telecommunications component of their broadband Internet access services, but cable and other competing broadband Internet access service providers are not.[168] This regulatory disparity puts wireline broadband Internet access service providers in an impossible position. Either they must absorb the additional seven percent cost in order to remain competitive with cable modem service or pass the additional cost through to consumers and risk not being price competitive with cable modem service. In either case, the Commission's lopsided universal service policy distorts the development of competition.

Verizon agrees with SBC that the Commission must harmonize the universal service contribution obligation of competing broadband Internet access service providers.[169] The existing regulatory disparity is completely at odds with the Commission's established policy of avoiding situations where providers with universal service obligations compete directly with providers without such obligations.[170] As the Commission has correctly recognized, "competitively neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition

[168] Sprint asserts that the Commission's current rules do not require a wireline company to include any component of broadband Internet access services in its universal contributions. Sprint at 19 n.17. Thus, it appears Sprint is not contributing to universal service based on revenues from DSL service that it offers to customers as a bundled broadband Internet access service. As Sprint acknowledges, its position is inconsistent with the Commission's statement in the *NPRM* that, under its existing rules, wireline providers have a *mandatory obligation* to contribute to universal service based on their provision of broadband services to affiliated or unaffiliated ISPs. In order to avoid confusion and competitive distortion in the broadband market, the Commission should clarify its existing rules to ensure that all wireline broadband Internet access service providers are contributing to universal service in a consistent manner.

[169] Verizon at 42-43.

[170] *See, e.g.*, *NPRM*, 17 FCC Rcd at 3054, ¶ 80 (citing Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9183-84, ¶ 795 (1997) ("*First Universal Service Order*"), *aff'd in part, rev'd in part and remanded*, *TOPUC v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. granted sub nom., GTE Serv. Corp. v. FCC*, 530 U.S. 1213, *cert. dismissed*, 531 U.S. 975 (2000)).

by limiting the available quantity of services or restricting the entry of potential service providers."[171] Having already concluded that cable modem and DSL services are competing technologies for providing high-speed access to the Internet,[172] the Commission has no choice but to impose a consistent universal service contribution obligation on both services.

Adhering to the Commission's policy of competitive neutrality is essential to achieving the various statutory objectives of section 254. It ensures that competing broadband providers contribute to universal service on an "equitable and nondiscriminatory basis," as required by section 254(d). It also ensures that the universal service mechanism remains predictable and sufficient, as required by section 254(b)(5). These objectives can be achieved only if competing broadband Internet access services have the same universal service contribution obligations. Moreover, establishment of consistent contribution obligations for all competing broadband Internet access services is compelled by section 706. As with other regulatory disparities, the artificial price advantage created by the current contribution rules distorts competition and denies consumers the benefits that flow from a competitive market

As SBC recently stated in its comments in the *Cable Broadband NPRM*, the Commission should take immediate action to eliminate the disparity in the assessment of universal service contributions on wireline broadband services compared to cable modem services. It could be many months before the Commission determines how to treat broadband Internet access services for universal service purposes. Rather than continuing to bestow an artificial regulatory advantage on cable operators during the interim period, the Commission should take immediate action to rationalize the obligation of competing cable modem services and DSL services. The Commission should either exercise its discretionary authority under section 254(d) and assess

[171] *Id.* at 3041-42, ¶ 48.

[172] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4802-04, ¶ 9.

universal service contributions on both services, or it should not assess universal service contributions on either service.

The Commission need not decide the broader universal service issues raised in this proceeding in order to provide this interim relief. Whether the Commission decides to include all broadband services in the contribution base (as SBC advocates) or to exclude such services from the contribution base, there can be no question that functionally equivalent cable modem and DSL services ultimately must be afforded consistent treatment. Therefore, the Commission can and should establish an interim requirement for both cable modem service and DSL service without prejudging the permanent treatment of broadband services for universal service purposes.

2. All Broadband Internet Access Services Should be Included in the Universal Service Contribution Base.

The Commission should exercise its discretionary authority under section 254(d) and assess universal service contributions on all broadband Internet access services, regardless of the type of service provided or the technology platform used by the service provider. A broad contribution base that includes all interstate telecommunications activity will ensure that the amount of universal service support remains predictable and sufficient in a rapidly changing market. It would be particularly bad policy to impose the vast majority of the contribution obligation on local telephone customers – the very customers whom the universal service program is designed to support. The inevitable result would be a decreasing pool of services contributing to universal service and an ever-increasing burden on local telephone customers who do not migrate to alternative services that are outside the contribution base. Moreover, as discussed below, assessing universal service contributions on all broadband Internet access services will ensure that the universal service program does not distort competition and impact customer decisions about whether to migrate to broadband services. Thus, a broad universal service contribution base is essential in a rapidly changing market where there are many different providers and technologies in competition with each other.

As the Commission has recognized, the universal service contribution methodology should not impose a disproportionate burden on any particular segment of telecommunications providers and their customers. No one questions the public policy benefits of universal service, but universal service contribution assessments are a significant cost to providers and are not seen as a "value-added" charge by customers. They impose a burden on each provider's relationship with its customers. Further, there is widespread concern that contribution costs will grow even larger as funding needs continue to increase. It is not surprising then, that cable operators and software companies that provide IP telephony capabilities do not want to contribute to universal service. This desire to minimize costs is understandable, but it does not provide a legitimate basis for being excluded from the contribution mechanism or for maintaining the current discriminatory contribution mechanism.

Some commenters claim that the Commission lacks the legal authority under section 254 to require ISPs to contribute to universal service.[173] Although section 254(d) vests the Commission with authority to require "[a]ny other provider of interstate telecommunications . . . to contribute to the preservation and advancement of universal service if the public interest so requires,"[174] these parties argue that ISPs do not "provide" telecommunications to anyone.[175] In particular, the Information Technology Association of America (ITAA) asserts that an ISP simply uses telecommunications to provide end-users with wireline broadband Internet access

[173] Monet at 5-8; Information Technology Association of America ("ITAA") at 40-42.

[174] 47 U.S.C. § 254(d).

[175] ITAA at 40.

services.[176] Monet likewise claims that none of the functionalities that ISPs provide its customers "can fairly be described as telecommunications."[177]

The *Cable Broadband Declaratory Ruling* makes clear beyond doubt that the transmission at issue qualifies under the definition of "telecommunications."[178] And the ISP is assuredly providing that transmission – or "telecommunications" – to retail customers as a component of its Internet access service.[179] As the Commission has already made clear, that telecommunications component qualifies for a discretionary contribution assessment under section 254(d). Accordingly, the Commission plainly has the authority to assess a universal service contribution based on the underlying interstate telecommunications component of Internet services.

As a fall-back position, NCTA attempts to argue that there is no policy justification for assessing universal service contributions on cable broadband Internet access service providers because they do not offer "public switched" services and may not even use the PSTN.[180] This argument completely ignores Congress's and the Commission's longstanding recognition that the nation as a whole benefits from ensuring universal service connectivity to the telephone network. It would be nonsensical for the Commission to adopt a policy that only those services that receive support from the universal service program are required to support the program. The Commission has never taken such a narrow view of the universal service program and, instead,

[176] *Id.* at 41.

[177] Monet at 5.

[178] *Cable Broadband Declaratory Ruling*, 17 FCC Rcd at 4823, ¶ 40.

[179] Indeed, ITAA admits as much. It notes that facilities-based carriers must make a payment to the USF "based on the provision of telecommunications service 'to itself' and to the non-affiliated ISP, just as it would if it provided the telecommunications service to any other customer." ITAA at 41 n.116.

[180] NCTA at 6.

has consistently sought to expand the universal service contribution base to include a broad range of providers and services. That is why companies like SBC are significant universal service contributors, even though they do not receive any federal high-cost funding, and consumers in low-cost urban areas contribute indirectly to universal service, even though their telephone services generally are not supported by the federal fund.

Moreover, the same policy justifications that led the Commission to exercise its discretionary authority and include private network operators in the universal service contribution base require the inclusion of cable modem and other broadband Internet access services in the contribution base. As with private networks, a cable broadband Internet access subscriber benefits from being able to establish connections with end users (both businesses and residential end users) that access the Internet via wireline connections that are supported by universal service.[181] Further, as discussed below, broadband Internet access services are used for IP telephony and other applications that compete directly with traditional telecommunications carriers. Thus, the principle of competitive neutrality dictates that such services must be included in the contribution base.[182]

The California ISP Association ("CISPA") agrees with SBC that all broadband Internet access service providers should contribute to universal service, but it attempts to draw a distinction between facilities-based and non-facilities-based ISPs.[183] Specifically, CISPA argues that non-facilities-based ISPs should continue to be excluded from the universal service contribution base.[184] Assuming the Commission harmonizes the contribution obligations of all

[181] *First Universal Service Order*, 12 FCC Rcd at 9184, ¶ 796.

[182] *Id.*

[183] CISPA at 70-71.

[184] *Id.* at 71.

broadband Internet access service providers, maintaining such a distinction would result in non-facilities-based ISPs continuing to contribute to universal service indirectly as retail customers.

The Commission should assess universal service contributions directly on ISPs that offer retail broadband Internet access services, regardless of facilities ownership. Consistent with the Commission's overall approach, the linchpin of the contribution obligation should be the service provider that has the retail relationship with the end-user customer. If an ISP has that retail relationship for broadband Internet access services, then it should be assessed the universal service contribution, regardless of whether it owns its own facilities. The Commission's contribution mechanism already operates that way with respect to local and long distance services. It is the local or long distance reseller with the retail relationship, *not* the underlying facilities provider, that is assessed universal service contributions.

Assessment of universal service contributions directly on ISPs would not constitute regulation of the Internet that contravenes congressional intent, as ITAA asserts.[185] It is ironic that ITAA is making this argument, given its calls for a significant increase in the amount of government regulation of wireline broadband Internet access services. ITAA apparently is not concerned about intrusive government regulation of the Internet when it applies to wireline broadband providers. In any event, participation in an important public policy program cannot be equated to the type of regulation of the Internet that Congress is concerned about. This is particularly true because ISPs *already* contribute indirectly to universal service for wireline broadband services. Therefore, assessment of direct, rather than indirect, universal service contributions for broadband Internet access services does not result in any new cost for many ISPs and is consistent with the Commission's traditional policy of including the telecommunications component of Internet services in the universal service contribution base.

[185] ITAA at 51.

Nor does assessment of universal service contributions on ISPs create significant administrative problems. The Commission's proposed connection-based approach to contributions will eliminate any operational difficulties associated with assessing universal service contributions on ISPs that self-provision transmission facilities. In addition, the Commission's existing *de minimis* exemption excludes providers from the contribution base in cases where the administrative costs of collecting a contribution outweigh the benefits. As a result, small "mom and pop" ISPs will see no change in the status quo and will not be required to contribute directly to universal service.

Finally, a compelling reason to include broadband Internet access services in the universal service contribution base is that such services increasingly are used to provide services that are substitutes and direct competitors with traditional telecommunications services that currently are included in the contribution base. IP telephony is the most commonly mentioned broadband application that provides a substitute to traditional telecommunications service, but broadband applications such as e-mail and instant messaging are also direct substitutes for traditional services. The exclusion of these services from the contribution base creates the same type of competitive distortion as the disparity in the treatment of cable modem and DSL services for universal service purposes.

As the Commission recognized in the *NPRM*, the migration of traditional services to broadband platforms has significant implications for the preservation and advancement of universal service.[186] Continuing to exclude dominant cable broadband Internet access services from the universal service contribution base distorts competition and jeopardizes the stability of the universal service fund. A General Accounting Office Report to Congress issued earlier this year discussed the effect that converging technologies such as IP telephony are having on the

[186] *NPRM*, 17 FCC Rcd at 3049, ¶ 66.

universal service program. The Report noted that, apart from any service or pricing advantages, business customers can realize a 10 percent savings by switching to IP telephony and avoiding universal service charges.[187] If the Commission does not address this pressing issue, wireline companies will continue to find themselves competing against broadband Internet access providers that enjoy an artificial competitive advantage in the market as a result of the disparate application of the universal service contribution mechanism.

ITAA argues that IP telephony should not be subject to universal service contributions because it is a nascent service that is not impacting wireline revenues.[188] The factual premise of ITAA's argument is demonstrably untrue, as shown by the rapid revenue losses being experienced by IXCs and the access line loss being experienced by ILECs. ITAA's argument also is beside the point. As noted in the GAO Report, IP telephony and other substitutes for traditional voice services exist in the market and are increasingly popular with customers.[189] If there are IP telephony providers or ISPs that are nascent competitors in the market, they will be covered by the *de minimis* exemption, which is specifically designed to forego collecting contributions from small telecommunications providers. That is much different from being entirely excluded from the universal service contribution base, no matter how large such providers grow in the future, which is what ITAA is seeking.

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[187] United States General Accounting Office, *Federal and State Universal Service Programs and Challenges to Funding*, GAO Report 02-187, at 22 n.31 (Feb. 2002) ("GAO Report").

[188] ITAA at 45.

[189] GAO Report at 18-20; *see also* Christopher Stern, *U.S. Firms Show More Interest in Phone Calls Via Internet*, Washington Post, June 19, 2002 (noting that Lehman Bros. has migrated to unregulated Internet telephone service and quoting a telecommunications analyst that IP telephony services pose a "huge risk" to traditional telephone companies).

Indeed, a general exemption for IP telephony based on the current market impact could be catastrophic in the future. The Commission raised the issue of IP telephony four years ago in a report to Congress, yet it has taken no action to address (or even study) the impact of Internet services on universal service. In the meantime, broadband Internet services and applications such as IP telephony and instant messaging have exploded in popularity. The Commission should act now, *before* the growing problem gets out of hand. In order to ensure the continued stability of the universal service fund, the Commission must establish contribution mechanism that is competitively and technologically neutral in the rapidly evolving market for telecommunications.

C. Cost Allocation

The Commission's actions in this proceeding will not raise any novel cost allocation concerns. Part 64 of the Commission's rules already provides a mechanism for allocating costs between regulated and non-regulated services, and these rules are sufficiently flexible to accommodate the reclassification of wireline broadband services as non-regulated. The Commission's existing cost allocation rules also are sufficient to ensure that the requirements of section 254(k) are satisfied. In fact, the Commission previously implemented the requirements of section 254(k) by incorporating them into its Part 64 rules.[190]

Moreover, as BellSouth correctly points out, there is no link between cost and price under price cap regulation, which obviates the need for any modifications to the cost allocation requirements for price cap ILECs.[191] Under price caps, cost allocations should have no effect on the prices paid by subscribers. The Commission's price cap rules also satisfy the requirements of

[190] Order, *Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, 12 FCC Rcd 6415 (1997).

[191] BellSouth at 28.

section 254(k) because they effectively prevent ILECs from increasing prices for regulated services to subsidize non-regulated services.[192] Given the safeguards contained in the Commission's existing regulatory framework, it is not surprising that few commenters even addressed cost allocation or separations issues.

SBC urges the Commission to ensure that the regulatory treatment of cost allocation issues does not have a negative impact on ILEC incentives to invest in broadband services. As we have emphasized throughout, a primary goal of the 1996 Act is to encourage the deployment of broadband services through regulatory forbearance and other measures that "remove barriers to infrastructure investment."[193] Creating new cost allocation rules, particularly rules that have a punitive or asymmetrical effect, for the provision of ILEC broadband services would be the opposite of what Congress had in mind. Such rules would limit the ILECs' ability to compete against unregulated competitors that are not subject to any burdensome cost allocation rules.

CONCLUSION

The Commission should take the deregulatory steps discussed above and in SBC's opening comments to create a minimal regulatory environment for all broadband information services that will be conducive to investment and will bring enormous benefits to American consumers.

[192] *Id.* at 33.

[193] *See* 1996 Act § 706 (codified at 47 U.S.C. § 157 note).

Respectfully submitted,

/s/ Michael K. Kellogg

Michael K. Kellogg
Sean A. Lev
Colin S. Stretch
David L. Schwarz
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Paul K. Mancini
SBC Communications Inc.
175 E. Houston
Room 1262
San Antonio, TX 78205
(210) 351-3448

Gary L. Phillips
Jeffry A. Brueggeman
SBC Communications Inc.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8800

July 1, 2002

Donald E. Cain
Vice President-Federal Regulatory

SBC Telecommunications, Inc.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
Phone 202 326-8875
Fax 202 408-4806
Email: dcain@corp.sbc.com

May 3, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: USIIA and SBC Joint Submission
CC Docket Nos. 02-33, 95-20 and 98-10

Dear Ms. Dortch:

The US Internet Industry Association (USIIA) and SBC Communications Inc. (SBC) hereby file this Joint Submission in the above-referenced dockets. In addition to this Joint Submission, USIIA and SBC are separately filing individual comments in this proceeding.

The attached Memorandum of Understanding (MOU) represents the shared view of USIIA — a trade association representing nearly 300 diverse members of the Internet industry — and SBC — a leading provider of broadband services — as to the optimal regulatory and business environment for all broadband Internet services. In particular, USIIA and SBC agree on a number of fundamental principles that will facilitate the maximum deployment of broadband Internet services:

- the Commission must establish a uniform national broadband framework with minimal regulation for all broadband Internet services;
- all providers of broadband services must be allowed to operate pursuant to the same regulatory framework so that no provider is advantaged or disadvantaged by asymmetrical regulation; and
- market-based commercial arrangements, rather than regulation, will best serve the interests of ISPs, broadband providers and consumers.

Consistent with these principles, SBC commits that commercial agreements for broadband Internet access will be available and negotiated between SBC and ISPs in a deregulated broadband market.

We believe the MOU is important because it demonstrates that SBC is committed to doing business with ISPs and that ISPs recognize the business advantages of negotiating commercial agreement with SBC in a deregulated, market-driven environment.

Respectfully submitted,

Donald E. Cain
SBC Communications Inc.

David P. McClure
US Internet Industry Association

Memorandum of Understanding

SBC and USIIA

Purpose: The purpose of this document is to delineate points of agreement between SBC Communications Inc. (SBC) and the US Internet Industry Association (USIIA) as it relates to the joint provisioning of high-speed Internet services to customers in SBC's operating territory.

Intent: The intent of this document is to facilitate consumer choice through regulatory parity, deregulation, and the implementation of fair and reasonable commercial contracts.

Outcome: If implemented, the following proposal and rules will facilitate the maximum deployment of high-speed (broadband) Internet services throughout the SBC operating territory.

National Broadband Framework

Technological convergence has made it possible for a variety of facility platforms to offer broadband services. The Federal Communications Commission (Commission) is the only regulatory body with authority over competing broadband platform providers -- cable, wireless, wireline and satellite. Accordingly, the Commission is the only regulatory body with the requisite jurisdiction to establish a uniform national framework governing this new and evolving convergent broadband marketplace. The Commission must exercise exclusive authority to encourage broadband investment and deployment in a manner that fairly governs the entire marketplace. The Commission must preempt any current or future state action that is inconsistent with the national framework or that seeks to impose regulatory requirements in a disparate manner on competing broadband platforms or providers.

Regulatory Parity

Fundamental to any uniform national framework is the premise that all providers of broadband services must be allowed to operate pursuant to the same regulatory framework with minimal regulation. This is essential to encourage investment, deployment, and the creation of new and beneficial market-driven products and services. No operators or technology platforms should be artificially advantaged or disadvantaged by asymmetrical regulatory rules.

Market-Driven Commercial Terms

Commercial agreements between SBC and ISPs should determine their business relationship. National policy must facilitate the formation of creative commercial arrangements that allow for differentiation in business relationships based on volume, terms, points of connection, and other established market services. Market-driven commercial contracts will facilitate the most efficient, productive, creative and technology-neutral provisioning of broadband services. SBC and the USIIA support market-based approaches to prices, terms, and conditions governing the business relationship between SBC and ISPs. Accordingly, existing Federal and State tariffs and other common carrier obligations should be replaced by market-based commercial arrangements. These business arrangements would remove constraints on both parties that deprive them of the opportunity to provide creative and innovative services to consumers.

Universal Service

No broadband service provider should be disadvantaged in the marketplace by having certain government-imposed universal service fund costs asymmetrically applied to its products while competitors are free from any such government obligation.

SBC Commitment

In a deregulated broadband market, SBC is willing to commit that, at a minimum, commercial agreements for high-speed Internet access will be available and negotiated between SBC and ISPs with connection at either Layer 2 (ATM) or Layer 3 (IP) (including converged Layer 2/3 networks) for the provision of Internet services to end users. Furthermore, the Commission could spur investment and improve efficiencies and ISP options even further if it was willing to allow SBC to transport and aggregate data traffic without regard to LATA boundaries.

Transition to Market-Based Commercial Agreements

In a deregulated broadband market, SBC is willing to grandfather existing agreements with ISPs for the remaining term of existing agreements or for one year, at the choice of the ISP. Information about generic business options will be made available for review by ISPs when they are considering SBC as a business partner for the delivery of broadband Internet services to customers.

Dated: May 2, 2002

SBC Communications, Inc.

Name: ____________________

Title: Sr. Exec. VP-Services

US Internet Industry Association

Name: ____________________

Title: President and CEO, USIIA